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APPENDIX

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 705

GEORGE WILLIAM BRUTON, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 16, 1967

CERTIORARI GRANTED OCTOBER 9, 1967

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 705

GEORGE WILLIAM BRUTON, PETITIONER,

vs.

UNITED STATES OF AMERICA

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[fol. 1]

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

Commissioner's Docket No. 5

Case No. 146

UNITED STATES OF AMERICA,

v.

GEORGE WILLIAM BRUTON

COMPLAINT for VIOLATION of U.S.C. Title 18, Section 2114

Before William R. O'Toole, St. Louis, Missouri.

The undersigned complainant being duly sworn states: That on or about April 16, 1965, at St. Louis in the Eastern District of Missouri, GEORGE WILLIAM BRUTON did rob one Paul Robinson, the Clerk in charge of Post Office Contract Station No. 7, at 3809 South Kingshighway, St. Louis, Missouri, the said Paul Robinson then and there having lawful charge, control and custody of money and property of the United States, of the sum of $30.00, more or less, of the money of the United States, and in effecting same he put the life of the said Paul Robinson in jeopardy by use of a dangerous weapon.

And the complainant states that this complaint is based on the following personal knowledge, information and belief:

Complainant ascertained that on the above date an individual who has been identified by the Clerk of said Station as the defendant entered the Contract Station of the St. Louis Post Office at the above address and at pistol point held up Paul Robinson, the Clerk on duty at that time, and robbed the said Paul Robinson of the sum of $30.00, being the property of the United States Post Office, and further, the said witness, Paul Robinson, has stated that defendant was then armed with a pistol.

And the complainant further states that he believes that — are material witnesses in relation to this charge.

J. B. Thorn, Postal Inspector.

Sworn to before me, and subscribed in my presence, April 25, 1966.

William R. O'Toole, United States Commissioner.

Filed May 20, 1966.

[fol. 2] UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

Commissioner's Docket No. 5

Case No. 146

UNITED STATES OF AMERICA,

v.

GEORGE WILLIAM BRUTON

WARRANT OF ARREST

To any United States Marshal or any duly authorized officer:

You are hereby commanded to arrest GEORGE WILLIAM BRUTON, and bring him forthwith before the nearest available United States Commissioner to answer to a complaint charging him with, did rob one Paul Robinson, the Clerk in charge of Post Office Contract Station No. 7, at 3809 South Kingshighway, St. Louis, Missouri, the said Paul Robinson then and there having lawful charge, control and custody of money and property of the United States, of the sum of $30.00, more or less, of the money of the United States, and in effecting same he put the life of the said Paul Robinson in jeopardy by use of a dangerous weapon in violation of U.S.C. Title 18, Section 2114.

William R. O'Toole, United States Commissioner.

Date April 25, 1966.

RETURN

Received April 25, 1966 at St. Louis, Mo., and executed by arrest of George Wm. Bruton at St. Louis Police Holdover on April 26, 1966.

U. S. Commissioner Wm. O'Toole.

Bond $10,000.00.

Hearing Continued, Committed to City Jail.

Date Apr. 26, 1966.

Olin N. Bell, U. S. Marshal, Eastern District of Mo.,
By Vernon Whitlock, Jr., Deputy.

Filed May 20, 1966.

[fol. 3] UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

Commissioner's Docket No. 5

Case No. 146

UNITED STATES OF AMERICA,

v.

GEORGE WILLIAM BRUTON

TEMPORARY COMMITMENT OF GEORGE WILLIAM BRUTON

To: The United States Marshal of the Eastern District of Missouri.

You are hereby commanded to take the custody of the above named defendant and to commit him with a certified copy of this commitment to the custodian of a place of confinement within the Eastern District of Missouri approved by the Attorney General of the United States where the defendant shall be received and safely kept until discharged in due course of law. The above named defendant has been arrested but not yet fully examined by me upon the complaint of J. B. Thorn, Postal Inspector, charging that on or about April 16, 1965 at St. Louis in the Eastern District of Missouri the defendant did rob one Paul Robinson, the Clerk in charge of Post Office Contract Station No. 7, at 3809 South Kingshighway, St. Louis, Missouri, the said Paul Robinson then and there having lawful charge, control and custody of money and property of the United States, of the sum of $30.00, more or less, of the money of the United States, and in effecting same he put the life of the said Paul Robinson in jeopardy by use of a dangerous weapon in violation of U.S.C. Title 18, Section 2114; and he has been directed to furnish bail in the sum of Ten Thousand dollars ($10,000.00) for his appearance before me at St. Louis, Missouri, on April 29, 1966, at 2:00 P.M., in accordance with all my orders and directions relating thereto, and he has failed to do so.

Dated: April 26, 1966.

William R. O'Toole, United States Commissioner.

RETURN

Received this commitment and designated prisoner on April 27, 1966, and on April 27, 1966, committed him to St. Louis City Jail, and left with the custodian at the same time a certified copy of this commitment.

Dated: Apr. 27, 1966.

Olin N. Bell, United States Marshal. Eastern District of Mo. By Vernon Whitlock, Jr., Deputy.

Filed May 20, 1966.

[fols. 4-9] UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

No. 66 Cr 80(1)

UNITED STATES OF AMERICA, Plaintiff,

v.

WILLIAM JAMES EVANS and GEORGE WILLIAM BRUTON, Defendants.

The Grand Jury charges:

That on or about the 16th day of April, 1965, in the City of St. Louis, in the State of Missouri, and within the Eastern Division of the Eastern District of Missouri, WILLIAM JAMES EVANS and GEORGE WILLIAM BRUTON, the defendants, did make an assault on Paul Robinson, a person having lawful charge, control and custody of United States Post Office Contract Station No. 7, with intent to rob, steal and purloin mail matter, money and other property which were then in the charge, control and custody of the said Paul Robinson, and in attempting to effect such robbery, William James Evans and George William Bruton put the life of the said Paul Robinson in jeopardy by the use of a dangerous weapon, to wit, a revolving pistol.

In violation of Section 2114, Title 18, United States Code.

A True Bill.

[Copy illegible] Foreman.

[Copy illegible], Ass't United States Attorney.

A True Copy of the Original Filed May 11, 1966.

Attest: Harold G. Pryce, Clerk. By ——, ——, Deputy Clerk.

Dated: May 24, 1967, St. Louis, Mo.

[fols. 10-14] UNITED STATES DISTRICT COURT, EASTERN DIVISION, EASTERN DISTRICT OF MISSOURI.

No. 66 Cr 80(1)

UNITED STATES OF AMERICA, Plaintiff,

vs.

WILLIAM JAMES EVANS and GEORGE WILLIAM BRUTON, Defendants.

VERDICT

We, the jury in the above entitled cause, on the trial of the Indictment herein, as to Defendant, George William Bruton find as follows;

We find said Defendant, Guilty as charged in the Indictment herein.

Dan L. Blacker, Foreman.

Dated this 21 day of June, 1966.

Filed June 21, 1966.

[fol. 15] UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

No. 66 Cr 80(1)

UNITED STATES OF AMERICA, Plaintiff,

v.

WILLIAM JAMES EVANS and GEORGE WILLIAM BRUTON, Defendants.

ORDER

Defendant George William Bruton's motion for a new trial heretofore filed and argued by counsel is hereby overruled in all particulars.

Roy W. Harper, United States District Judge.

Dated this 1st day of July, 1966.

Filed July 1, 1966.

[fol. 16] UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION.

No. 66 Cr 80(1)

UNITED STATES OF AMERICA,

v.

GEORGE WILLIAM BRUTON

JUDGMENT AND COMMITMENT

On this 1st day of July, 1966, came the attorney for the government and the defendant appeared in person and with his attorney.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty, entered May 16, 1966, and a jury verdict of guilty, entered June 21, 1966, of the offense of assaulting a person in charge of U.S. Post Office Contract Station No. 7, at St. Louis, Mo., with intent to steal mail matter, money and other property, and placing the life of Paul Robinson in jeopardy in attempting to effect such robbery by the use of a revolving pistol;

In violation of Section 2114, T.18 U.S. Code, as charged in the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Twenty Five (25) Years as to and under the charge contained in the Indictment.

IT IS ADJUDGED that the amount of the appeal bond herein is set at $15,000.00.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Roy W. Harper, United States District Judge.
Harold G. Pryce, Clerk. (By) Ellen C. Donovan, Deputy Clerk.

Filed July 1, 1966.

[fol. 17] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION.

No. 66 Cr 80(1)

UNITED STATES OF AMERICA, Plaintiff,

vs.

WILLIAM JAMES EVANS and GEORGE WILLIAM BRUTON, Defendants.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner George William Bruton moves the Court for an order permitting him to appeal to the United States Court of Appeals for the Eighth Circuit, in forma pauperis, from the judgment of the United States District Court, Eastern District of Missouri, Eastern Division, entered on July 1, 1966, pursuant to the provisions of Title 28, U. S. Code, Section 1915, and in support thereof attaches the affidavit of said petitioner.

Petitioner's Notice of Appeal is being filed with this motion and petitioner's affidavit.

Daniel P. Reardon, Jr., Attorney for Petitioner, 706 Chestnut Street, Suite 411, St. Louis 1, Mo. Ch. 1-7325.

AFFIDAVIT OF GEORGE WILLIAM BRUTON

STATE OF MISSOURI,
City of St. Louis, ss:

GEORGE WILLIAM BRUTON, being duly sworn, deposes and says:

1. I am a citizen of the United States and the petitioner in the above action.

[fol. 18] 2. I desire to prosecute an appeal to the United States Court of Appeals for the Eighth Circuit from the judgment entered by the United States District Court, Eastern District of Missouri, Eastern Division on July 1, 1966, but because of my poverty I am unable to pay the costs of said appeal or purchase the transcript of the record or give security therefor and still be able to provide myself and my dependents with the necessities of life.

3. I believe I am entitled to the redress I seek by way of appeal to the United States Court of Appeals.

WHEREFORE, affiant prays that he may have leave to proceed in this court on appeal to the United States Court of Appeals for the Eighth Circuit in forma pauperis.

George William Bruton.

Subscribed and sworn to before me this 7th day of July, 1966.

Karl F. Lang, Notary Public.

My Commission expires 6/6/68.

Copy of the above and foregoing served on Robert J. Koster, Assistant U. S. Attorney, Federal Building, St. Louis 1, Missouri 7/11/66.

Filed July 11, 1966.

[fols. 19-21] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION.

No. 66 Cr 80(1)

UNITED STATES OF AMERICA, Plaintiff,

vs.

WILLIAM JAMES EVANS and GEORGE WILLIAM BRUTON, Defendants.

NOTICE OF APPEAL

Notice is hereby given that George William Bruton, defendant above named, appeals to the United States Court of Appeals of the Eighth Circuit from the sentence and judgment imposed in this proceeding on July 1, 1966.

Daniel P. Reardon, Attorney for appellant George William Bruton, 706 Chestnut Street, Suite 411, St. Louis 1, Mo. Ch. 1-7325.

Copy of foregoing Notice of Appeal delivered to Robert J. Koster, Assistant U. S. Attorney, Federal Building, St. Louis 1, Missouri, this 11 day of July, 1966.

Daniel P. Reardon, Jr.

Filed July 11, 1966.

[fol. 22] MANDATE

UNITED STATES OF AMERICA, ss:

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

TO THE HONORABLE THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

GREETING:

WHEREAS, lately in the United States District Court for the Eastern District of Missouri, before you, or some of you in a cause between United States of America, Plaintiff, and William James Evans and George William Bruton, Defendants, No. 66 CR 80(1), Eastern Division, wherein judgment and sentence of the District Court as to Defendant, George William Bruton was entered on the 1st day of July, A.D. 1966, which judgment and sentence is set out in the original files of the said District Court, and is incorporated herein by reference thereto, as by the inspection of the record of the said District Court, — which was brought into the United States Court of Appeals for the Eighth Circuit by virtue of an appeal agreeably to the act of Congress, — in such case made and provided, fully and at large appears;

AND WHEREAS, at the September term, in the year of our Lord one thousand nine hundred and sixty-six, the said cause came on to be heard before the said United States Court of Appeals, on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment and sentence of the said District Court, in this cause, be and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, George William Bruton, do surrender himself to the custody of the United States Marshal [fol. 23] for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after date of filing of the mandate of this Court in the District Court.

March 22, 1967.

YOU, THEREFORE, ARE HEREBY COMMANDED that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

WITNESS, the Honorable EARL WARREN, Chief Justice of the United States, the 17th day of April, in the year of our Lord one thousand nine hundred and sixty-seven.

Filed April 17, 1967.

Robert C. Turle, Clerk of the United States Court of Appeals for the Eighth Circuit.

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 18,490

GEORGE WILLIAM BRUTON, Appellant,

vs.

UNITED STATES OF AMERICA.

MANDATE

[fol. 24] UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 18,489

WILLIAM JAMES EVANS, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

No. 18,490

GEORGE WILLIAM BRUTON, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

Appeals from the United States District Court for the Eastern District of Missouri.

[March 22, 1967.]

Before MATTHES, LAY and HEANEY, Circuit Judges.

MATTHES, Circuit Judge.

William James Evans and George William Bruton were jointly indicted, tried and convicted by a jury of violating [fol. 25] 18 U.S.C. § 2114 (1948).[1] Following the entry of judgment imposing the mandatory sentence of twenty-five years they duly perfected their appeals to this Court.

The focal and crucial point both in the district court and on appeal is the admissibility into evidence of two oral con-

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[1] 18 U.S.C. § 2114 (1948) provides in pertinent part:

"Whoever assaults any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin [the same] * * * or robs any such person of mail matter, or of any money, or other property of the United States, * * * or puts his life in jeopardy by the use of a dangerous weapon, * * * shall be imprisoned twenty-five years."

fessions made by the defendant Evans. Both confessions were made prior to *Miranda* v. *Arizona*, 384 U.S. 436 (June 13, 1966). Trial, however, commenced on June 20, 1966; hence *Miranda* is applicable and controlling. *Johnson* v. *New Jersey*, 384 U.S. 719 (June 20, 1966).

We first give attention to the offense which was established by uncontradicted evidence.[2]

Paul J. Robinson operated a jewelry store and watch repair shop on South Kingshighway in St. Louis, Missouri. His place of business was also a contract station or branch for the United States Post Office Department, and postal services were offered to the general public. Miss Shirley Miller was, on the date in question, and had been for some time prior thereto, an employee in the store and contract station. At approximately 2:00 P.M. on Good Friday, April 16, 1965 two Negro men entered the establishment and while Miss Miller was waiting on them each drew a gun, pointed it towards Miss Miller, and ordered her to the rear of the premises. Robinson was working in the store behind a partition. He was nevertheless able to see and observe the men through a small window in the partition. Both [fol. 26] Robinson and Miss Miller were commanded by their assailants, at gunpoint, to lie on the floor face down behind the partition. Their legs and arms were bound. Glass showcases were broken and a safe containing Government property was opened. Various articles of merchandise and more than thirty dollars in Government money were taken by the robbers. The victims later were able to free themselves and report the holdup to the police.

Robinson's place of business was located in an area occupied almost exclusively by white persons and was infrequently patronized by Negroes. Miss Miller testified that the individual identified as defendant Evans had been in the store about eight times during the period of a year and one-half prior to the offense. Robinson stated he had sold Evans stamps on the Monday prior to the holdup. In this setting both Robinson and Miss Miller had no difficulty whatever in promptly and positively identifying Evans on April 8, 1966, when they viewed him in a line-up at the St.

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[2] Neither defendant testified nor offered any evidence during the trial.

Louis Police Headquarters. Only Miss Miller, however, identified Bruton in a later line-up conducted on April 25, 1966. Robinson, "who just saw him [Bruton] come in" and did not see him again while the robbery was in progress, was unable to positively identify Bruton.

At the threshold of the trial the court conducted a hearing out of the presence of the jury for the purpose of determining the voluntariness of certain incriminating statements elicited from Evans during a police interrogation. This procedure comports with the rule prescribed in *Jackson v. Denno,* 378 U.S. 368 (1964). Evans also objected to the admissibility of his incriminating statements during the course of the trial.

The preliminary hearing conducted by the court revealed that Evans was arrested on March 22, 1966 and detained [fol. 27] for a period of nearly two weeks prior to the first interrogation by local officials. At police headquarters, on April 4, 1966, Detective Oscar Farmer, of the St. Louis Metropolitan Police Department interrogated Evans in general about various robberies in the city, but did not specifically question him as to his participation in the Robinson postal robbery. He testified that prior to the interrogation he advised Evans only of his right to have an attorney and was informed by Evans that an attorney already represented him.[3]

Farmer continued his interrogation of Evans on April 8, 1966 after Evans had been positively identified by Robinson and Miss Miller as one of the participants in the postal robbery. Concededly, no warning of any type was given to Evans on this date. Evans repeatedly denied involvement in the robbery during the first two interrogation sessions conducted on the 8th, the second of which transpired in the presence of Miss Miller and Robinson. Evans, however, finally admitted his participation during the third period of questioning later that day. Only sub-

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[3] Neither party attempted to elaborate as to the nature of the warning given to Evans on April 4th. Notwithstanding the fact that Evans explicitly denied the existence of any such warning on that date, we nevertheless feel justified in concluding that the warning in its limited form fell far short of the constitutional standards set forth in *Miranda, supra.*

sequent to these admissions did Farmer discuss with Evans the possibilities of dropping current state charges involving a Western Union robbery in favor of Federal prosecution. The record is totally silent as to the manner of interrogation, and consequently, we do not infer that Evans' confession was a product of his own voluntary purge of conscience rather than the result of Farmer's psychological pressure during the repeated interrogations.

Following Evans' admissions on the 8th, Farmer contacted J. B. Thorn, a United States Postal Inspector, who [fol. 28] subsequently conducted his own interrogation of Evans in the city jail on April 11, 1966 in the presence of Farmer. Farmer admittedly revealed to Thorn prior to this date the fact that Evans had confessed his role in the crime during the April 8th interrogation and that he had been positively identified by Robinson and Miss Miller. The inference is clear that Farmer desired Evans to reiterate his former admissions of guilt in the presence of Thorn and himself. Thorn's questioning focused specifically on the robbery of the postal station. His testimony, however, corroborated in substance by Farmer, indicated that he gave Evans the following preliminary warning:

> "I told him that he was a suspect in this matter, that he was not required to give any statements, in fact, he was not required to talk to me, that any statements he gave could be used against him in a court of law, and that he further had the right to an attorney."

The discussion between Thorn and Evans then centered on whether Evans was presently represented by counsel. Evans then named his attorney, but in Thorn's opinion gave no indication that he wished to consult with him prior to being interrogated. Thorn's testimony, categorically denied by Evans during the preliminary hearing indicated Evans' apparent willingness to submit to the interrogation process without the assistance of counsel:

> "* * * Mr. Evans stated that Mr. Harris [Evans' attorney] was coming to see him on that particular day. I asked him if he would rather that I wait until Mr. Harris came to the City Jail. He stated no, that we could talk and that he would give Mr. Harris the information."

The Thorn interrogation of April 11th similarly culminated in Evans' admission that he was implicated in the [fol. 29] robbery of the postal contract station. Thorn and Farmer again discussed the possibilities of dropping state charges in favor of a Federal prosecution. Although the record appears somewhat ambiguous as to exactly what point in time this discussion took place, Thorn did testify that he believed it transpired subsequent to the time Evans implicated himself in the robbery.

A complaint was filed on April 11, 1966, with the United States Commissioner charging Evans with robbery of the postal contract station. A warrant of arrest was issued by the Commissioner on the same day, but was not executed until May 3rd, the day after the state charges against Evans were dropped and he was released from state custody. Pursuant to Rule 5(a), Fed. R. Crim, P., Evans was brought before the United States Commissioner on May 3, 1966, at which time it is agreed he was fully advised as to his rights. At Evans' request the case was continued until May 10, 1966. On May 11, 1966 the indictment under which Evans and Bruton were tried was returned and filed with the district court.

On May 4th, Thorn conducted a subsequent interrogation of Evans. This interview likewise proved fruitful in that Evans again described his participation in the robbery in some detail and implicated Bruton as his accomplice.

At the conclusion of the hearing on the motion to suppress, the district court was of the opinion that the failure of Detective Farmer to advise Evans of his rights on April 8th, prior to the confession obtained by Farmer, was totally irrelevant. The only reason expressed by the court for permitting the confession to be introduced was the following:

> "I think Mr. Thorn advised him of his rights, and as to what he told Mr. Thorn at that time, I think it's [fol. 30] admissible. Not getting back into what he may have told Farmer at some other time, because that doesn't have anything to do with it."

In addition the record fails to disclose any finding that Evans had knowingly and intelligently waived the right to have his attorney present during the interrogation by

Thorn. An essential element of voluntariness is an effective waiver by the accused of his right to retained or appointed counsel. As *Miranda* teaches:

> "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. *Escobedo* v. *Illinois*, 378 U.S. 478, 490, n.14. This Court has always set high standards of proof for the waiver of constitutional rights, *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), and we re-assert these standards as applied to in-custody interrogation." 384 U.S. at 475.

It is doubtful, moreover, whether the court's limited finding in regard to the issue of voluntariness meets the test promulgated in *Jackson* v. *Denno:*

> "Where pure factual considerations are an important ingredient, which is true in the usual case, appellate review in this Court is, as a practical matter, an inadequate substitute for a full and reliable determination of the voluntariness issue in the trial court and the trial court's determination, pro tanto, takes on an increasing finality. The procedures used in the trial court * * * must, therefore, be fully adequate to insure a *reliable and clear-cut determination* of the voluntariness of the confession, including the resolution of disputed facts upon which the voluntariness issue may depend." (Emphasis supplied). 378 U.S. at 390-91. See also *Sims* v. *Georgia*, . . . U.S. . . . January 23, 1967).

[fol. 31] In summary, the district court was required to make a finding on the record with "unmistakable clarity" that (1) the *Miranda* warnings were given; (2) the defendant knowingly and intelligently waived his privilege against self-incrimination (see 384 U.S. at 475); (3) the defendant voluntarily, knowingly and intelligently waived his right to have retained or appointed counsel present at the interrogation; (4) the confession or statement was freely and voluntarily made.

But quite apart from the inadequacy of the court's findings, for reasons stated below, we believe the confessions obtained by Thorn are invalid as a matter of law and should not have been admitted into evidence.

In reaching this decision we are mindful that the pivotal question is whether the circumstances attending Evans' detention by the local police and his confession of April 8th, prior to any warning of his right to remain silent, bring this case within the teachings of *Westover* v. *United States*, 384 U.S. 436 (1966), a companion case to *Miranda*, where the Supreme Court struck down a confession given to the F.B.I. authorities following an interrogation by local officials.

There is present in this case one circumstance, absent in *Westover*, which militates in favor of the validity of the confessions which were received into evidence. There was a lapse of three days between the time Detective Farmer obtained the concededly invalid confession (April 8th) and the time Inspector Thorn, after proper warning, obtained the second confession (April 11th). In *Westover* the interrogation by the F.B.I. began immediately after the interrogation by the local officers had ceased. The Supreme Court viewed this as a "continuous period of questioning", the effect being that the defendant was not adequately warned of his right against self-incrimination until the very end of the interrogation process.

The Supreme Court in *Westover* noted, however, that a different result would have been warranted if the "accused were taken into custody by the second authority, removed *both in time and place* from his original surroundings, and then adequately advised of his rights and given an opportunity to exercise them." (Emphasis supplied). 384 U.S. at 496.

The interval of three days may be sufficient to warrant a finding that Evans had been "removed in time • • • from his original surroundings" when he was questioned by Inspector Thorn, but he was clearly still in the custody of local authorities during Thorn's interrogation. This fact, together with Farmer's continuous presence during the interrogation of April 11th, prevented the effective removal of Evans from his original surroundings.[4]

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[4] Evans was interrogated by Farmer when the first confession was obtained at the police headquarters. He was

There are other compelling circumstances which militate against the validity of the confessions. Evans had been detained in jail continuously for a period of two weeks and three days (March 22nd to April 8th), and, absent any warnings of his rights, had been subjected to at least three interrogations by local officers before he finally confessed to Farmer. He had been a prisoner two weeks and six days before he was adequately advised of his rights. More significant, however, in our view is the circumstance, not present in *Westover,* that Evans had made his inculpatory statements prior to his confrontation with Federal authorities on April 11th. Thus, at the time the warnings were given and the confession relied upon by the Government [fol. 33] was obtained, Evans had already fully revealed his involvement in the robbery. As Justice Jackson aptly stated in *United States* v. *Bayer,* 331 U.S. 532 (1947):

> "Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first." 331 U.S. at 540.

We have studiously pondered the question before us and cannot escape the conclusion that the Federal authorities were, under the teachings of *Westover,* "the beneficiaries of the pressure applied by the local in-custody interrogation." Of course, if Evans had been timely and fully apprised by the local officers of his constitutional right to remain silent in accordance with the rules promulgated by *Miranda,* the incriminating statements later given to Thorn would be invulnerable to constitutional attack.

While we cannot escape the feeling that there was independent, corroborating evidence which strongly sug-

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again interrogated by Thorn in the presence of Farmer at the city jail. This difference was not meaningful. Evans was on both occasions a prisoner and the atmosphere on April 11th was no different than it was on April 8th.

gested the guilt of Evans, we are nevertheless mindful of the Supreme Court's observation in *Miranda, supra:*

> "Dealing as we do here with constitutional standards in relation to statements made, the existence of independent corrobating evidence produced at trial is, of course, irrelevant to our decisions." 384 U.S. note 52, at 481. See also *Jackson* v. *Denno,* 378 U.S. 368, 376 (1964).[5]

The totality of the circumstances impel us to hold that the confessions before the jury were tainted and infected [fol. 34] by the poison of the prior, concededly unconstitutional confession obtained by the local officer. Our decision, however, is limited to the facts before us and should not be interpreted as a per se rule that would prevent law enforcement officers of one jurisdiction from interrogating an individual who has been detained and questioned by other authorities for a period of time without appropriate warnings. The Supreme Court has stated as much in *Westover,* 384 U.S. at 496. Questions of this nature must be decided on an ad hoc basis. On this record we hold that there was a causal relationship between the unconstitutional confession and the later incriminating statements which were imparted to the jury. This being the situation, a reversal of Evans' conviction is required.

We affirm Bruton's conviction. It should be noted that this defendant at no time moved for a severance as authorized by Rule 14, Fed. R. Crim. P. Perhaps Bruton proceeded on the theory that it was to his tactical advantage to be tried jointly, inasmuch as the evidence relating to his identification was weaker than that pertaining to Evans, and for the additional reason that the confessions were admitted solely as evidence against Evans. Be that as it may, the question is now presented whether Bruton's rights were prejudiced by admission of the invalid statements hereinabove discussed.

The district court in its instructions, to which no excep-

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[5] In view of the cogent, independent evidence against Evans and in light of the teachings of *Miranda,* we are caused to wonder why the Government prosecutor offered the statements as evidence.

tion was taken, explicitly limited the purpose and effect of the incriminating statements made by Evans.[6] The rule is

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[6] After the Government had rested, the court cautioned the jury as follows:

> "Gentlemen of the jury, I would like to say to you at this time yesterday there was testimony here with respect to a statement made by the defendant Evans to Thorn, the Postal Inspector, in the presence of, at least in one instance, in the presence of the Detective Farmer, and some reference to a second statement that was made only in the presence of Thorn. That statement, which I will instruct you about in the instructions, if used, can only be used against the defendant Evans. It is hearsay insofar as the defendant George William Bruton is concerned, and you are not to consider it in any respect with respect to the defendant Bruton, because insofar as he is concernd it is hearsay."

In its formal charge to the jury the court again instructed:

> "A confession made outside of court by one defendant may not be considered as evidence against the other defendant who was not present and in no way a party to the confession. Therefore, if you find that a confession was in fact voluntarily and intentionally made by the defendant Evans, you should consider it as evidence in the case against Evans, but you must not consider it, and should disregard it, in considering the evidence in the case against the defendant Bruton.
>
> . . . . . .
>
> It is your duty to give separate, personal consideration to the cause of each individual defendant. When you do so, you should analyze what the evidence shows with respect to that individual, leaving out of consideration entirely any evidence admitted solely against some other defendant. Each defendant is entitled to have his case determined from his own acts and statements and the other evidence in the case which may be applicable to him."

[fol. 35] firmly established that in a joint trial, an incriminating statement made by one defendant which would implicate another defendant is admissible into evidence only against the declarant. The corollary of this rule is that the admission into evidence of a co-defendant's statement, under proper cautionary and limiting instructions, will not necessarily require a reversal of the conviction of the other defendant. *Delli Paoli* v. *United States,* 352 U.S. 232 (1957); *Haggard* v. *United States,* 369 F.2d 968, 975 (8th Cir. 1966); *United States* v. *Gardner,* 347 F.2d 405, 406-07 (7th Cir. 1965), *cert. denied,* 382 U.S. 1015 (1966). As we have noted, the effect of Evans' incriminating statements and the purpose for which they were admitted were outlined to the jury on two occasions in clear, concise and understandable language. The court carefully confined the scope of the statements. To overturn Bruton's conviction we would be required to speculate that the jury, presumably composed of prudent and intelligent men, disregarded the court's instructions and their oaths. The Supreme Court has expressed similar sentiments in dealing with this very question:

> [fol. 36] "To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions." *Opper* v. *United States,* 348 U.S. 84, 95 (1954).

See also *Delli Paoli* v. *United States, supra,* at 242, and *Golliher* v. *United States,* 362 F.2d 594 (8th Cir. 1966), where we stated:

> "We must assume the jury was capable of assessing the evidence and followed the instructions of the court as they are bound to do by their oath." 362 F.2d at 603.

The evidence designed to establish Bruton's guilt, wholly apart from Evans' statements, is, in our view, necessarily a factor to be considered in determining whether there is a sound basis for deciding that admission of the statements into evidence did not affect the substantial rights of Bruton.

Inasmuch as Bruton challenges the sufficiency of the evidence to sustain his conviction, we have carefully analyzed the evidence against him.[7] The fact question before the jury turned on the identification of Bruton. Although this important element was established by only one of the victims, Miss Miller, her uncontradicted testimony provided the jury with convincing proof of Bruton's participation in the crime.[8]

We need not recount in detail Miss Miller's testimony relating to this aspect of the case. It is sufficient to say [fol. 37] that after her face to face encounter with Bruton during the holdup, she was able to positively identify him at the police line-up on April 25, 1966 and again at the trial.

In summary, we are convinced (1) that there was substantial, independent evidence of Bruton's guilt; (2) that the court's instructions to the jury provided Bruton with sufficient protection so that the admission of Evans' statements, strictly limited to use against Evans, did not work to the prejudice of Bruton.

The judgment of conviction against Evans is reversed and the cause is remanded for another trial. The judgment of conviction against Bruton is affirmed.

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[7] As the reviewing Court, we have considered the independent evidence of Bruton's guilt in the light most favorable to the Government. *Beatrice Foods Co.* v. *United States*, 312 F.2d 29, 40 (8th Cir. 1963), *cert. denied*, 373 U.S. 904 (1963).

[8] A perceptible characteristic of Bruton was a "bad" eye. This was observed by Miss Miller during the holdup.

[fol. 38] UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 18,490 September Term, 1966

GEORGE WILLIAM BRUTON, Appellant,

vs.

UNITED STATES OF AMERICA.

JUDGMENT

APPEAL FROM the United States District Court for the Eastern District of Missouri.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, George William Bruton, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after date of filing of the mandate of this Court in the District Court.

March 22, 1967.

Order entered in accordance with Opinion:—

[Copy Illegible] Clerk, U.S. Court of Appeals for the Eighth Circuit.

[fol. a] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

No. 66 CR 80 (1)

UNITED STATES OF AMERICA, Plaintiff,

vs.

WILLIAM JAMES EVANS and GEORGE WILLIAM BRUTON, Defendants.

Transcript of Proceedings—June 20, 21, & July 1, 1966

* * * * * * *

[fols. 1-2] The Court: You gentlemen, if you will, go to your jury room and we will call you. We have a matter that you are not concerned with involving the law, so we will call you back in a few minutes.

(Whereupon, the following proceedings were had out of the presence and hearing of the jury:)

[fol. 3] The Court: You may proceed.

J. B. THORN, being produced, sworn and examined in behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Koster:

Q. Will you state your name, please?
A. J. B. Thorn.
Q. What is your business or occupation?
A. I am an United States postal inspector.
Q. Were you employed as a postal inspector in April of 1965, or '66, excuse me?
A. Yes, I was.
Q. Now, I want to direct your attention to the 11th of April, 1966——

The Court: What date?
Mr. Koster: The 11th of April.

Did you have an occasion on April 11th to see the defendant William Evans in this case?

A. Yes, I did.
Q. Where did you see him?
A. In the City Jail.
Q. St. Louis Municipal Jail?
A. St. Louis City Jail, yes.
Q. Were you alone or were you with someone?
A. I was with someone.
Q. Who were you with?
A. Detective Oscar Farmer of the St. Louis Metropolitan [fol. 4] Police Department.
Q. And Evans was confined in the City Jail at that time?
A. That's correct.
Q. Now, approximately what time of the day did you go there, if you recall?
A. It was after lunch. I would surmise between 1:00 and 2:00 o'clock.
Q. Was this the first time you saw Evans?
A. It was.
Q. Were you introduced to him or had it happened when you got to the jail?
A. When I got to the jail I was introduced to him as a postal inspector by Detective Farmer. After I was——
Q. Was there any other conversation between Evans and Farmer other than he introducing you to him?

Mr. Cooper: I object to that. That would be hearsay.
The Court: The answer to that is yes or no.

Be overruled.

A. There was a conversation.
Q. (By Mr. Koster) Prior to the time that you started questioning Evans?
A. Yes. Detective Farmer informed the——

Mr. Cooper: I'm going to object. That would be hearsay [fol. 5] whatever Farmer told.
The Court: Be overruled. It was in the presence of him.

A. That what my purpose there was was the conversation between the detective and the defendant.
Q. (By Mr. Koster) Told him you were investigating——
A. The armed robbery of Robinson Jewelry Store and Contract Station No. 7.

Q. He told them who you were?

A. Right.

Q. What did you do at that point?

A. At that point, I have a commission which shows my name and my title, I gave that to Mr. Evans. I again told him who I was and that any matter involving the post office department I was interested in, that I was specifically investigating the armed robbery of the Robinson Jewelry Store which contained Contract Station No. 7.

Q. Now, did you give Evans any further advice before you started to question him?

A. I did.

Q. What did you tell him?

A. I told him that he was a suspect in this matter, that he was not required to give any statements, in fact, he was not required to talk to me, that any statements that he gave [fols. 6-8] could be used against him in a court of law, and that he further had the right to an attorney.

Q. All right, now, after giving him that advice did you discuss any more about his right to have an attorney or anything of that nature concerning an attorney?

A. We did.

Q. What was that discussion?

A. I asked him if he had an attorney.

Q. You asked Evans that?

A. That's correct.

Q. What did Evans say?

A. He did have an attorney.

Q. Did he give you the name of his attorney?

A. Mr. Al Harris.

Q. Was there any other discussion about Mr. Harris at that point?

A. There was. Mr. Evans stated that Mr. Harris was coming to see him on that particular day. I asked him if he would rather that I wait until Mr. Harris came to the City Jail. He said no, that we could talk and that he would give Mr. Harris the information.

Q. Did you then start to question Mr. Evans?

A. I did.

Q. Did he then give you some answers to your questions?

* * * * * * *

[fol. 9] Q. All right. Now, when you told him he was a suspect in the—this armed robbery of the Subcontract Station, did you know then that he had been in jail for something else?

A. Yes, sir.

Q. How did you find out he was in jail for something else? Did someone tell you that?

A. Yes, sir.

Q. As a matter of fact, he was in jail on suspicion of robbing a Western Union office, is that right?

A. I have learned that, yes, sir.

Q. Did you know that then?

A. I believe that I did. I'm not sure whether I called the Prosecutor's office, but I did know that.

Q. Eventually before you left that day and after talking to Evans you knew he was in jail and charged with a robbery of a Western Union office?

[fol. 10] A. That's right.

Q. And you knew that that was a State charge?

A. Yes, sir.

Q. Now, did you make any statements to Evans during the course of this conversation on April 11th concerning the Western Union charge?

A. Other than maybe the fact "Did you do it?" I had no interest in the Western Union—the armed robbery of the Western Union. That is not under my jurisdiction, sir.

Q. I think you said either you knew he was charged with it when you came into the meeting or you called the Circuit Attorney's office?

A. No, I knew it before I—I found it out either at the time of the meeting or I called the Circuit Attorney's office before I went there. I don't recall which, because I talked to them on several occasions.

Q. Who did you speak to in the Circuit Attorney's office?

A. One of the ladies there.

Q. Did you ever speak to any of the assistants?

A. I believe—not on that particular day, no, sir.

Q. How about prior to that date?

A. Not prior to that date, no, sir.

Q. Did you make any statement to Evans that you would [fols. 11-12] use your efforts to have the State charge dropped if he would confess to the—this Federal charge?

A. Not an effort to have the State charges dropped, no, sir, that I couldn't.

Q. What did you say to him concerning the State charge?

A. He indicated to me a desire to clean up the Federal charges. The only thing that I could do under those circumstances was I talked with his attorney, Mr. Harris.

Q. Was that after this date?

A. Yes, sir.

Q. I'm talking right now about that date and during the course of that conversation, on that date, did you mention to him that you might be able to get the State charge dropped?

A. I would talk to Mr. Harris.

Q. What did you tell him that you would talk to Mr. Harris about?

A. To see if there could something be done to—for him to be released to Federal authorities.

Q. Now, at that time when you mentioned that to Evans had he given you a statement yet?

A. I believe he had told me that he was implicated, sir.

[fols. 13-14] Q. And, well, what did you want to know in addition to that? Did you want to know more facts about it than what you have just said?

A. Yes, I asked other questions on that date.

Q. Well, is that when you then said something about "I will talk to Mr. Harris about the State charge"?

A. After he had indicated to me that he would like to get the two charges or all the charges taken—taken care of, I think would be an adequate description.

* * * * * * *

[fol. 15] By Mr. Reardon:

[fol. 16] Q. Mr. Thorn, you mentioned that you informed Evans that he was a suspect when you went to the City Jail?

A. Yes, sir.

Q. Now, upon what did you base that conclusion? What information did you have that permitted you to classify him as a suspect?

A. I had been informed that he had been identified.

Q. He had been identified, and who informed you?

A. I believe Detective Farmer informed me of that fact.

Q. He had been identified by how many individuals?

A. Mr. Robinson and Miss Miller.

Q. Now, do you have the date, do you know the date when that identification was made?

A. No, sir, I don't.

Q. Did you ask Farmer?

A. I believe that I did, but it doesn't——

Q. What representations did Farmer make to you when he originally contacted you with regard to the case?

A. That one of the men involved in the holdup had been identified.

Q. Did he indicate to you that he had questioned that individual, specifically Evans?

A. Yes, sir.

[fol. 17] Q. Did he also tell you that individual, Evans, had denied the robbery?

A. I can't—I don't recall whether it was at the time—I was out of town when this happened. I received a telephone call.

Q. When the identification occurred?

A. Yes, sir. I received a telephone call and I returned the call and I don't remember in what precise point I was advised of this or by who.

Q. Well, perhaps the date is April 8th that the identification was made?

A. I don't know, sir.

Q. Farmer made no representation to you, did he, as you went over to the City Jail that his man Evans had admitted the robbery?

A. I believe that he indicated that they had—he had been interrogated and that Evans had discussed the robbery with him.

Q. Did he indicate that he had admitted it or denied it?

A. I'm not positive but I believe he indicated that there was an indication that he was involved. I won't say admitted, an indication that he was involved.

Q. Now, Detective Farmer was anxious at that time to [fol. 18] help solve this particular case, was he not?

A. I would say so, sir.

Q. And certainly you had knowledge when you went over to the City Jail to see this man that he was a State prisoner charged in another robbery?

A. Yes, sir.

Q. And he had an attorney?

A. He was a State prisoner and I don't recall at what stage I learned what he was charged with.

Q. Now, when you went over with Detective Farmer did Detective Farmer make any statements to Evans in your presence other than just introducing you?

A. Other than to talk to him.

Q. Well, did he make any statements with regard to dropping—having the State charges dropped so that you can wind up everything in a Federal prosecution?

A. That was probably discussed, yes.

Q. By Detective Farmer and yourself?

A. Yes, sir.

Q. And subsequently I assume you do have knowledge that the State charges were dropped?

A. Yes, sir.

Q. In favor of the Federal prosecution?

A. Yes, sir.

[fol. 19] Q. Now, then, when did you apply for the warrant or when did you bring this man to the United States Commissioner? I'm speaking of Evans.

A. An information was filed on that same day.

Q. That was on the 11th?

A. Yes, sir.

Q. Did you go to talk to anybody with regard to dismissing the charges in the Circuit Attorney's office, the State charges?

A. I discussed it with one of the assistants, I don't recall his name, that there was a Federal violation involved.

Q. Now, then, prior to discussing it with him did you contact Al Harris, the attorney for Mr. Evans, in the State charge?

A. I talked with Mr. Harris about it. I don't recall whether it was that day or the following day.

Q. Which day are we speaking of? We are speaking of after the 11th now?

A. No, I don't recall whether it was the 11th or following that.

Q. Well, the point is that you did speak with Mr. Harris with regard to obtaining a dismissal of the State action, did you not?

[fol. 20] A. Yes, sir.
Q. So you did talk to Evans' attorney, correct?
A. Yes, sir.
Q. After the admission?
A. Yes, sir.
Q. Not before?
A. No, sir.

Mr. Reardon: That is all I have.
Mr. Koster: I have a matter I didn't bring out on direct examination, your Honor.

Redirect examination

By Mr. Koster:

Q. Mr. Thern, after April 11th did you ever see Evans again?
A. Yes, I did.
Q. When was the next time?
A. I believe it was on May the 4th.
Q. Where did you see him on that occasion?
A. In the City Jail.
Q. Who was present on that occasion?
A. Only Mr. Evans and I.
Q. Did you question him on that occasion?
A. I did.
Q. Prior to questioning him on May 4th did you advise [fol. 21] him of his rights?
A. I did.
Q. What did you tell him?
A. That again I was continuing the investigation in the armed robbery of Contract Station No. 7 operated by Robinson Jewelry Store, that he was not required to make any statements to me, and that any statements that he could make could be used against him in a court of law.
Q. Did you advise him of his right to an attorney on May the 4th?
A. Yes, sir.
Q. Had you been in the United States Commissioner's office on May the 3rd?
A. Yes, sir.
Q. You were present in the Commissioner's courtroom?
A. In the Commissioner's hearing, yes, sir.
Q. Was Evans in there that day?

A. Yes, sir.

Q. Was he brought before the Commissioner?

A. Yes, sir.

Q. Did the Commissioner advise him of his rights to not to make a statement, that it may be used against him and that he had a right to an attorney?

A. Yes, sir.

[fol. 22] Q. And you were present when that advice was given to him?

A. Yes, sir.

Q. Did the Commissioner offer to appoint him an attorney? What was done about his representation at that point on May 3rd?

A. At that point——

Mr. Cooper: I will object to anything the Commissioner may have said to him as being hearsay.

Mr. Koster: Well, the defendant was there, your Honor.

The Court: Be overruled. Only as to what was said in the defendant's presence.

Q. (By Mr. Koster) What was the conversation between the Commissioner and the defendant as to an attorney on May the 3rd?

A. The conversation was that the defendant believed that he had an attorney or would secure an attorney.

Q. So he——

A. The Commissioner did not appoint an attorney.

Q. He said he was going to get his own counsel?

A. Yes, sir.

Q. Now, prior to going to the jail on May the 4th did you contact Mr. Al Harris?

[fol. 23] A. Yes, I did.

Q. What was the purpose of contacting Mr. Harris?

A. The last attorney of record that I had was Mr. Harris. I contacted him and asked him if he had any objection to me interviewing Mr. Evans again.

Q. What did he say?

Mr. Cooper: Objection, that would be hearsay, Judge, anything Mr. Harris would say.

The Court: Well, this is a matter before the Court. I'll hear it for what it may be worth.

Q. (By Mr. Koster) What did Mr. Harris say?

A. He had no objection.

Q. Now, on May the 4th, then, did you again question Evans in the City Jail?

A. I did.

Q. Did he answer your questions on that date?

A. He did.

Q. Now, going back to April 11th when you talked to him about the State charges and the Federal charges and the possibility of dropping the State charges, was that before or after he implicated himself in the robbery of the subcontract station?

A. It would have to have been after.

Q. Did you go immediately or did you begin questioning [fols. 24-27] him immediately about his participation in the robbery?

A. In the Contract Station 7?

Q. Yes.

A. Yes.

Q. And afterwards you discussed——

A. During the initial interview I gathered information about him personally, his age, where he lived, his family, and from there we went into the discussion of the armed robbery.

Q. And then after that you discussed the disposition of the various charges?

A. No, I told him that I could not promise him anything.

Q. I understand that, but was that after that was discussed?

A. Right.

Q. The possibilities of the various dispositions?

A. Right, still understanding that I could make him no promises.

* * * * * * *

[fol. 28] Oscar Farmer, being produced, sworn and examined in behalf of the plaintiff, testified as follows:

Direct examination

By Mr. Koster:

Q. Will you state your name, please?

A. Oscar Farmer.

Q. Keep your voice up. You are a member of the St. Louis Metropolitan Police Department?

A. I am.

Q. What is your assignment now?

A. Robbery Division, Detective Bureau.

Q. In March and April of 1966 you were in the same assignment?

A. I was.

Q. Now, Officer, did you have occasion to assist in the investigation of the Robinson Jewelry holdup?

A. I did.

Q. When was the first time, or did you ever question William Evans in connection with that offense?

A. I did.

Q. Do you recall the date, the first time you questioned Evans?

[fol. 29] A. It's about the 4th, I think it was.

Q. Fourth of what?

A. April.

Q. Keep your voice up.

A. April.

Q. April 4, 1966?

A. That's right.

Q. Now, did you advise him of his rights to have an attorney at that time?

A. He was advised, yes.

Q. Did you question him again?

A. I did.

Q. When was the next time you questioned him?

A. Wait a minute. I want to correct that.

Mr. Cooper: Speak up.

A. I want to correct that. The next date we brought him in he wasn't questioned by us, he was questioned by Mr. Thorn.

Q. (By Mr. Koster) Let's get this straight. Did you question him on April the 8th, specifically?

A. That's right.

Q. A Friday?

A. That's right.

Q. Were you there at the show-up that day?

[fol. 30] A. I was.

Q. Do you know Miss Miller and Mr. Robinson?

A. I do.

Q. Were they there?
A. They were also there, yes.
Q. After the show-up you questioned Evans?
A. I did.
Q. Did you advise him of his right to have an attorney at that time?
A. Yes, he was advised.
Q. Are you sure of that?
A. I'm sure.
Q. On April the 8th?
A. On the 8th we didn't inform them. We had informed them prior to that.
Q. So you questioned him on April 8th and you didn't advise him of his right to have an attorney?
A. That's right.
Q. Did you question him in the presence of Miss Miller and Mr. Robinson?
A. I did.
Q. Did you advise him of his right to have an attorney at that time?
A. No, I didn't.
[fol. 31] Q. That is on April the 8th?
A. That's right.
Q. So when you questioned him on the 8th he was not advised of his right to counsel or that he could have an attorney present?
A. That's right.
Q. Now, did you question him any more between April the 8th and April the 11th?
A. No, on the 11th he was questioned by Mr. Thorn.
Q. Did you question him between April 8th and April 11th?
A. No, I didn't.
Q. Where did the questioning on April the 8th take place?
A. That was at police headquarters.
Q. At Twelfth and Clark?
A. Twelfth and Clark, that's correct.
Q. What was done with him when you were finished questioning him that day?
A. He was taken back over and placed in the City Jail.
Q. Where did you see him the next time?
A. The next time we saw him at the City Jail.

Q. And that was on April the 11th?
A. That's right.
[fol. 32] Q. And that was you and Thorn?
A. That's right.

Mr. Koster: I have no further questions.

Cross-examination

By Mr. Cooper:

Q. Officer Farmer, did you arrest Mr. Evans?
A. No, we didn't arrest him, no.
Q. Were you the one that picked him up on the State charge?
A. No, we wasn't.
Q. You did not?
A. No.
Q. Do you know when he was arrested for the State charge?
A. No, I'm not positive of the date on that.
Q. Would it have been around sometime around March 22nd or 23rd of this year?
A. It could have been. I'm not positive.
Q. Well, am I off a day or so at the most?
A. Well, I'm not positive. I don't know.
Q. Well, you first questioned Evans on April 4th. He had been in City Jail before then, hadn't he?
A. Yes.
Q. Do you know approximately how long he had been in
[fol. 33] City Jail before April 4, 1966?
A. No, I don't.
Q. Would it have been as much as a week?
A. I don't know.
Q. You don't know. All right. Now, how did you happen to question Evans on April 4th?
A. We questioned him relative to robberies.
Q. In general?
A. Yes.
Q. I see. And at that time did you tell him that you were questioning him concerning the Robinson Jewelry robbery?

A. At that time we didn't question him about the Robinson Jewelry.

Q. You were just questioning him in general?

A. That's right.

Q. So the answer to my question is no you didn't tell him that you were questioning him concerning the Robinson Jewelry Company?

A. No.

Q. All right. Now, on April 4th, then, did you advise him that he had a right to an attorney?

A. Yes.

Q. Did you know then that he had an attorney?

[fol. 34] A. He said he had an attorney.

Q. All right, and, therefore, you knew on April 8th that he had an attorney also?

A. Yes.

Q. And you knew on April 11th he had an attorney?

A. He said he had an attorney.

Q. Did he tell you the attorney's name?

A. Yes.

Q. Who was it?

A. Al Harris.

Q. Now, as I understand it, then, on April 8th you questioned him again but you did not advise him of any of his rights?

A. No.

Q. And at that time on April 8th did he deny involvement in this robbery of the Robinson Jewelry Company?

A. No, he didn't.

Q. He did not deny it?

A. No.

Q. When did he deny involvement in the Robinson Jewelry robbery?

A. Maybe I can correct that statement.

Q. All right.

A. He did at first deny it and then admitted it.

[fol. 35] Q. Well, let's go back then. When, on what date if you recall——

A. That was on the 8th.

Q. All right. As I understand it, correct me if I'm wrong, at first when you discussed it with him on April 8th he denied any involvement in the Robinson Jewelry robbery?

A. That's right.
Q. Is that right?
A. That's right.
Q. Now, did you continue to interrogate him on that date?
A. No, we didn't.
Q. You didn't interrogate him any more on that date?
A. I did some more that date, not at that time.
Q. Not at that time. Later on in the day?
A. That's right.
Q. When he first denied any involvement in the robbery who was present if anyone besides you and he?
A. Detective Bradley.
Q. Anyone else present?
A. That is all.
Q. Did you tell Evans that you would be back later to talk to him or something?
[fol. 36] A. No, we didn't.
Q. Then I assume you came back to the City Jail, though, later that day?
A. That's right.
Q. Was anyone else present with you and Evans when you interrogated him the second time that day?
A. Yes, there were.
Q. Who was present this time?
A. Detective Bradley and myself and Miss Shirley Miller and Paul Robinson.
Q. And at that time did you question him again concerning the Robinson Jewelry's case?
A. That's right.
Q. And as I understand it you still did not advise him then of his rights, is that correct? Is that a correct statement?
A. That's right.
Q. And then did he say to you he did not want to discuss the Robinson Jewelry case?
A. He denied it.
Q. He denied it again?
A. Yes.
Q. Then did you and Robinson and Miss Miller leave?
A. That's right.
[fol. 37] Q. And Bradley left?
A. That's right.

Q. Did you come back a third time that day to talk to Evans?

A. We did.

Q. Who was present on that third time?

A. Detective Bradley and I.

Q. Just the two of you?

A. That's right.

Q. And on that third occasion as I understand it you did not advise him of his rights?

A. That's right.

Q. Now, did he tell you then that he didn't want to talk about this Robinson Jewelry holdup?

A. No, he didn't.

Q. Did he admit it on that date?

A. He admitted it that time.

Q. Then he admitted it, is that right?

A. Yes.

Q. Now, as I understand it then, you didn't see him again until when?

A. The 11th.

Q. Were you present when Mr. Thorn interrogated Mr. Evans?

[fol. 38] A. I was.

Q. And did you or Mr. Thorn advise him if at all of his rights on that date?

A. Mr. Thorn advised him.

Q. You didn't say anything?

A. No, I didn't question him.

Q. Well, now, on April 8th did he admit this robbery?

A. Yes.

Q. What did you come back to talk to him about then on April 11th?

A. On the 11th we came back with Mr. Thorn to question him, that he had admitted the robbery prior to that.

Q. Why did you come back a second time? That is what I mean, with Mr. Thorn, if he had already admitted it on April 8th?

A. Mr. Thorn, he is the postal inspector, and he is supposed to have the information, have knowledge of the type of offense.

Q. Then on April 11th Mr. Thorn comes back just with you, is that right?

A. Yes.

Q. Now, when was Mr. Evans taken to the United States Commissioner?

A. We wasn't present when he was taken before the [fol. 39] Commissioner.

Q. Did you take him over there?

A. No, we didn't.

Q. Do you know when he was taken?

A. I am not positive on that.

Q. Do you know if he was taken before you questioned him with Mr. Thorn on April 11th?

A. No, he was taken afterwards.

Q. He was taken afterwards?

A. Yes.

Q. Was it the same day, do you know, or the next day, or next week?

A. I'm not positive of the date.

Q. So certainly between April 4th, 1966, and April 11th, seven days, he was not taken before a United States Commissioner in that one-week period, is that right?

A. No.

Q. Is that a correct statement?

A. That's right.

Q. There is a reward out on this case, isn't there?

A. I'm not positive whether there is or not.

Q. You don't know if there is an award out?

A. I don't know, that is exactly.

Q. I didn't ask you the amount, I said did you know if [fol. 40] there is a reward out?

A. I don't know whether there is a reward on this particular case or not.

Mr. Cooper: I have nothing further, your Honor.

By Mr. Reardon:

Q. Did you inform the postal inspector on the 11th, that is the date of his visit to the City Jail with you, that Evans had admitted this offense?

A. I did.

Q. So that he knew that he had already admitted it to you, is that correct?

A. That's correct.

Q. Did you also inform him that Al Harris, Mr. Al Harris, represented Evans?

A. No, I didn't.

Q. You didn't contact, between the 8th of April and the 11th of April, you didn't contact Mr. Al Harris, did you?

A. No, I didn't.

Q. And you didn't inform him in advance that you were bringing Mr. Thorn, the postal inspector, to interrogate his client, did you?

A. No, I didn't.

Q. You say there was no instructions given him on April [fol. 41] the 8th with regard to his rights, that is, this fellow Evans' rights?

A. No.

Q. You did know at the time that you questioned him that he had a lawyer and had a State charge that had been pending for some time?

A. Yes.

Q. Because you had questioned him some good—perhaps a week earlier with regard to other offenses?

A. Yes, he had been given a chance to talk to his lawyer, call his lawyer by telephone.

Q. Did you talk or discuss with him the possibilities of seeing that the State charges were dropped in favor of Federal prosecution?

A. Yes.

Q. What did you tell him, Oscar?

A. I told him there was a possibility that the State may drop their charges in favor of the Federal prosecution. I think I told him that.

Q. And did he seem to desire the Federal prosecution in preference to the State?

A. That I'm not sure. I'm not positive of that.

Q. What were his problems with regard to the State prosecution, do you know?

[fol. 42] A. No, I don't. I don't recall.

Q. Did you make any representation to him that perhaps he could make a bond through the Federal courts easier than in the State courts?

A. No, I didn't.

Q. No discussion of that nature?

A. No.

Q. Did you talk with anyone with regard to dismissing the State charges?

A. No, I didn't.
Q. You did not.
A. No.
Q. Were they dismissed?
A. They were dismissed in favor—I don't know if they are pending, I'm not positive, pending the outcome of this case.
Q. If I were to tell you—oh, I see. But presently they are dismissed, are they not?
A. Yes.
Q. In other words, he is presently a Federal prisoner not a State prisoner?
A. That's right.

Redirect examination.

By Mr. Koster:

[fol. 43] Q. Detective Farmer, I just have one question: The interrogation on April 8th, it took place in police headquarters, is that correct?
A. On the——
Q. April the 8th?
A. That's right.
Q. All of it in police headquarters?
A. That's right.
Q. Not in the City Jail?
A. That's right.

Mr. Cooper: May I ask just one more question, your Honor?

Recross-examination.

By Mr. Cooper:

Q. Detective Farmer, when you mentioned the possibility that the State charges might be dropped, was this on April 8th or April 4th? Just when was that?
A. No, this was on the 8th.
Q. On the 8th?
A. Yes.
Q. Before then he had not confessed to anything?
A. We hadn't questioned him until the 8th relative to the Federal charge.

Q. I see, but again when you told him there was a possi-
[fol. 44] bility that the State charge might be dropped, this was on April 8th?

A. That's correct.

Q. And this was before he had admitted anything, isn't that true?

A. No, this was—this wasn't before he admitted it, no.

Q. You mean it was after he had admitted it?

A. Yes.

Q. Did he admit it on April 8th?

A. Yes.

Q. And on April 11th?

A. That's correct.

Q. And he admitted this particular crime before you told him there was a possibility that the State charges might be dropped?

A. That's correct.

Mr. Cooper: I have nothing further, your Honor.

By Mr. Reardon:

Q. You prepared a supplementary police report with regard to this, did you not?

A. Yes.

Q. Over there in the St. Louis Police Department?

A. You mean to the admissions?

[fol. 45] Q. That is what I'm going to get around to asking you.

A. No.

Q. The supplementary report doesn't reflect an admission on April 8th, does it?

A. No.

Q. It only reflects an admission on April 11th?

A. That's right.

Q. Why would you have left that out of the supplementary report?

A. We had the—we had completed the report and at the time he gave that to me for confidentially, and we had completed the report and after we completed the report we talked to him, and he gave it to me, he didn't give his part confidentially, but he involved someone else, and we had promised him that we wouldn't divulge that, so with the promise I did not do it.

Q. In other words, he had given you confidential information on the 8th?

A. That's right.

Q. And therefore it isn't reflected in the report, and it was after you had received the confidential information that you brought Mr. Thorn over there on the 11th?

A. Yes.

Q. That wasn't going to be confidential, was it?

[fol. 46] A. Well, the information that I had was still confidential because I still didn't divulge——

Q. Didn't you tell Mr. Thorn about the confidential information?

A. No.

Q. You did not?

A. No, the confidential information wasn't on him, it was on someone that was with him, and he didn't care to mention that.

Q. Pardon me?

A. The confidential information was on a different subject that he didn't want to mention at the time.

Q. Does the confidential information of April 8th have anything to do with the Robinson Jewelry Store?

A. Yes, it did.

Q. I assume it implicated someone else?

A. That is definitely right.

Q. So he admitted it then himself, that is your testimony here, on the 8th of April he admitted——

A. That's right.

Q. That was confidential?

A. No, that part wasn't confidential. The confidential part was who was involved with him.

Q. You may have made an effort to keep that confidential [fol. 47] as a matter of fact, but, in other words, you brought Mr. Thorn over on April 11th to make it official?

A. That's right.

Q. There was implication in the April 11th statement to Mr. Thorn, was there not?

A. On the 11th, no, on the 11th he still didn't tell Mr. Thorn who was with him.

Q. He did not?

A. No, not in my presence, I'll say it like that.

Q. Were you ever present with Mr. Thorn and the defendant Evans on an occasion other than the 11th of April?

A. Only on the one occasion.
Q. Just that one occasion?
A. Yes, sir.

Mr. Koster: I have nothing further.
The Court: Stand aside.

(Witness excused.)

The Court: Call your next witness.
Mr. Koster: That is all I have, your Honor.
Mr. Cooper: If the Court please, at this time I would like to introduce some evidence, but I would like to reserve my client's privilege against waiving his right to self-incrimination by putting both he on and also a record of the file of the Circuit Court——
[fol. 48] The Court: Bring the jury in, we might as well send them to lunch.

(Whereupon, the following proceedings were had in the presence and hearing of the jury:)

The Court: You all can just stand here without getting in the box.
During the noon hour, gentlemen of the jury, do not discuss the case among yourselves, let anyone talk to you about it or talk to anyone about it. We're going to be another thirty minutes, I think, here on this, with which you are not concerned, no need of you having to stay in there, so you will be excused at this time until two o'clock.

(Whereupon, the following proceedings were had out of the presence and hearing of the jury:)

The Court: Call your first witness.
Mr. Cooper: Yes, your Honor, may it be understood that this will not waive his right to self-incrimination?
The Court: What is your position?
Mr. Koster: You mean call—no, he's just being called for the purpose out of the hearing of the jury?
Mr. Cooper: Correct.
Mr. Koster: That is agreeable.
The Court: What do you want the——
Mr. Cooper: Just the court file.
[fol. 49] The Court: You ought to be able to stipulate on that.

Mr. Cooper: The only one I want is involving William James Evans.

The Court: What is it you want to show?

Mr. Cooper: By this File 773-0, entitled "State of Missouri vs. William James Evans," this involves that robbery at the Western Union office. It shows that this man was charged on an information with this particular crime on March 23, 1966. The file also shows that this charge was dismissed on May 2, 1966, that this file also shows that an information—looks like a supplementary information was filed on April 5, '66.

That is all admitted, isn't it, Mr. Koster?

Mr. Koster: Your Honor, maybe just to clarify the record, it indicates on March 23rd that defendant was charged with robbery in the first degree by means of dangerous and deadly weapon in the Court of Criminal Correction in the City of St. Louis. He, of course, then was certified to the Circuit Court under another information which was filed on April 5, 1966, in the Circuit Court of the City of St. Louis, so he had—apparently he had his preliminary hearings and motions, which are not reflected in this file, this is the Circuit Court file, they had preliminary hearings and motions in front of the judge of the Court of [fol. 50] Criminal Correction and was later certified to the St. Louis Circuit Court. This is the St. Louis Circuit Court file. We don't know from this file exactly the date and what happened in the Court of Criminal Correction.

Mr. Cooper: Except we know this charge was dropped on May 2, 1966.

Mr. Koster: Oh, yes.

Mr. Cooper: That is the only purpose of this file.

The Court: Very well.

Mr. Cooper: Should we let this man take it back since all of this is agreed to?

The Court: I don't know.

Mr. Cooper: It's all stipulated to?

Mr. Koster: Yes.

Mr. Cooper: All right, thank you.

WILLIAM JAMES EVANS, being produced, sworn and examined in behalf of the defendants, testified as follows:

Direct examination.

By Mr. Cooper:

Q. Your name, please?
A. William J. Evans.
Q. Mr. Evans, when were you first arrested and brought to the City Jail in March of 1966?
[fol. 51] A. I was arrested on March 22nd of this year and I was brought over to the City Jail the 24th of March.
Q. When did you first find out that you were suspected of having robbed the Robinson Jewelry Company and the Post Office Subcontract Station?
A. Well, first time I found it out it was—I don't remember the date, but I think it was about a week after I was in jail.
Q. And did either Officer Farmer or Mr. Thorn at that time tell you you were suspected of this crime?
A. No, they didn't.
Q. You found out through some other source a week later?
A. Yes.
Q. Now, when did you first speak to either Officer Farmer or Inspector Thorn?
A. Well, I spoke to Mr. Farmer first over at the police headquarters. He came over after I was in jail and got a court order to interrogate me of a robbery of a subpost office on South Kingshighway.
Q. Do you recall what date this was?
A. No, I don't remember the date.
Q. Do you remember what day of the week it was?
A. It was on—it was on a Friday.
[fol. 52] Q. Was that on Good Friday of this year?
A. Good Friday.
Q. And do you know if Good Friday was April 8th of this year?
A. No, I didn't.
Q. Whatever Good Friday was of this year, that was the first time you spoke to Officer Farmer, is that right?
A. Yes.

Q. Now, prior to speaking to Officer Farmer did he tell you what you were suspected of and why he wanted to talk to you?

A. Well, he didn't tell me I was suspected of anything. He said he had a robbery that he had on me, he wanted to talk to me about.

Q. Another robbery?

A. He had this robbery, this post office robbery he wanted to talk to me about.

Q. Is that what he told you?

A. Yes.

Q. I see. Did you talk to him about the post office robbery?

A. Well, I denied the fact of knowing anything about it.

Q. Well, but you did talk to him about it?

[fol. 53] A. Yes.

Q. Before you said anything about this did he advise you of any of your rights?

A. No, he didn't.

Q. Did he say anything to you about your right to have an attorney?

A. Well, he asked me if I had an attorney. I told him yes, it was Al Harris.

Q. And did he advise you that anything you said, you might say, could be and would be used against you?

A. No, he didn't.

Q. Then did you go on and speak to him anyway?

A. I didn't have anything to say to him.

Q. Did you deny involvement in this robbery?

A. I denied it.

Q. Was anyone present besides you and Farmer?

A. I think it was Bradley.

Q. Bradley. At that time had you been brought to the U. S. Commissioner as yet?

A. No, I hadn't.

Q. Now, did you ever talk to anyone else that day besides Farmer and Bradley?

A. No, I didn't.

Q. And did you speak to Farmer after that time?

[fol. 54] A. Yes, I spoke to him.

Q. Did you speak to him more than once that day or did you speak to him again that day?

A. Well, they kept questioning me that day and I kept

denying it, the fact that I knowed anything about the robbery.

Q. Was that on that date?

A. Yes.

Q. In other words, you denied all involvement on April 8th or Good Friday, whatever that was?

A. Yes.

The Court: Now, let's just not worry too much about the dates. You're assuming that he knows. Let's just find out how many dates there were.

Mr. Cooper: All right, Judge.

The Court: I mean the particular date doesn't mean anything.

Mr. Cooper: All right.

The Court: He doesn't know what it is.

Q. (By Mr. Cooper) On that day you denied any involvement in it?

A. Yes, I did.

Q. Did you speak to Officer Farmer or Mr. Thorn after that time, after that date?

[fol. 55] A. I spoke to Mr. Farmer.

Q. Do you remember what day it was or date?

A. It was the first date, the 8th. It was Good Friday.

Q. That is what you have just told us, but after that time did you ever speak to him again?

A. Yes, he brought Mr. Thorn, I believe it was the Saturday after Good Friday, brought Mr. Thorn over to the City Jail.

Q. Did they say anything to you about your right to an attorney or right to self-incrimination or anything like that?

A. No, they didn't.

Q. At that time did Mr. Thorn ask you if you had an attorney?

A. Yes, he did.

Q. Did you tell him Al Harris?

A. Yes, I did.

Q. Did either Mr. Farmer, Officer Farmer or Inspector Thorn say they had spoken to Mr. Harris?

A. Officer Farmer told me he would get in touch with Al Harris.

Q. They didn't advise you of any of your rights then on this Saturday?

[fol. 56] A. No, they didn't.

Q. Did they make any statements to you concerning the State Western Union charge?

A. Yes, they did.

Q. Was that on this Saturday?

A. It was on that Saturday.

Q. Who said it?

A. Well, Officer Farmer and Mr. Thorn, both of them was talking to me, and they told me, said, "We know you have this charge, this Western Union charge on you, and that you have a prior conviction of a robbery." He said, "You know, if you would take this into court, and if you would lose, that you would have to go and do some time, and then come back, and you would still have this postal robbery on you, and you would have to be facing this whenever you get through with your time." Then they said that—Mr. Thorn, Officer Farmer, said, "We could get this State charge dropped and bring you in the Federal court," and said, "You can snatch ten years and go with us, and that if you would take this, this will be better for you than go ahead on and try and fight this Western Union case and have to do time on both of them."

So, due to the fact that I had been convicted once on a robbery, well, when they offered to make this deal with [fol. 57] me, that I could come in Federal court and get ten years on it, they said I was subject to making probation on it, because I was a first defendant, that I hadn't been in any Federal court before. Well, due to these circumstances, this is the reason why that I told Officer Farmer and Mr. Thorn that I would come in Federal court and plead guilty to on this charge.

Q. All right, when you and he had this—when you and they had the discussion about the State charge, and they told you what you just stated, had you told them anything about the robbery other than just denying it, up to that time?

A. I hadn't told them nothing. I denied it.

Q. Then it was after this discussion about the State charge when you admitted this robbery?

A. Yes.

Q. And that was the Saturday following this Friday, is that right?

A. Right.

Q. All right. Did you ever have any discussions with him after that time, Farmer or Thorn?

A. No, I didn't. I take that back. Yes, I did.

Q. When was that, do you know?

A. Well, I talked to Thorn—I talked to Officer Farmer [fol. 58] first.

Q. Can you tell us about when that was, do you know?

A. This was on the date that they brought me over, this Good Friday I talked to Oscar Farmer first, and he brought up this deal to me, and so——

The Court: Let me get myself straight. On this Good Friday you talked to Farmer and then you talked to Thorn?

The Witness: No, I talked to Mr. Farmer first.

The Court: Did you talk to Thorn later that day?

The Witness: No, I didn't see Thorn 'til Saturday.

The Court: The next day?

The Witness: Right.

Q. (By Mr. Cooper) All right, we have been through that. What I meant was, I think you said you spoke to Thorn and Farmer after that Saturday?

A. I spoke to Thorn and Oscar Farmer that Saturday.

Q. We are over that Saturday.

A. Yes.

Q. How about after that, did you ever talk to them again about that?

A. Well, I didn't see them—well, Mr. Thorn came over and talked to me, but—Mr. Thorn came over and talked to me.

[fol. 59] Q. Mr. Thorn came. When was this other time that you say you talked to Thorn after this Saturday? What day was that on?

A. I don't know the date.

Q. If Thorn stated, I think, it was April 11th, would that be right?

A. It's possible.

Q. Well, was it just a couple days after that Saturday?

A. Yes.

Q. And you and Thorn were alone when you discussed it?

A. Yes.

Q. At that time had you been brought to the U.S. Commissioner's office yet?

A. No.

Q. Did Thorn advise you of any of your rights prior to talking to you on April 11th?

A. No, he didn't.

Q. Did he tell you you had a right to an attorney?

A. Well, he knew I had an attorney but he didn't advise me to any of my rights; just kept saying, "I'll talk to Al Harris and see what we can do for you."

Q. When were you taken to the U.S. Commissioner's office?

A. Sometime in May.

Q. Was it in May?

[fol. 60] A. I believe it was. It was around the first part of May.

Q. Was Al Harris ever present when you ever had any conversations with either Farmer or Thorn concerning this charge?

A. Well, Al Harris never was present.

Q. He was never present at any of those times?

A. No.

Q. After you first denied any involvement in this on Friday, did you tell Farmer or Thorn that you didn't want to talk about it any more?

A. Yes, I did.

Q. Did they continue to interrogate you, though?

A. Yes, they did.

Mr. Cooper: I have nothing further, your Honor.

By Mr. Reardon:

Q. You heard Detective Farmer testify here prior to your taking the witness stand, is that correct?

A. Right.

Q. And he says that in his testimony that on the—April the 8th, that you had given him some confidential information.

A. Right.

Q. Would you tell us about that?

[fol. 61] A. Well, Mr. Farmer, he asked me about Mr. Bruton, William Bruton. He said that he had had information that we were the ones that had robbed this sub-post office and he asked me to tell them about Bruton. Well,

I told them that I didn't know nothing about it, and at the time, well, Oscar Farmer said, "Well, we have information, you don't have to tell us," said, "we have information, people have told us that you are the one and we are going to pick Bruton back up on this charge."

Q. Were you permitted to make a phone call?

A. Yes, I was.

Q. To whom—during this interrogation did you phone anyone in particular?

A. Yes, I did.

Q. Who did you phone?

A. I phoned a young lady by the name of Rose Rivers.

Q. Had she had any difficulty with Bruton?

A. Well, they had a misunderstanding.

Q. The question I want to ask is the confidential information, did you give to Detective Farmer on April 8th of this year the confidential information that he has determined to be confidential implicating Bruton?

A. Yes, I did.

Q. Why?

[fols. 62-65] A. Well, it was because of the fact that Mr. Bruton was supposed to have had—done something to this lady friend of mine, and through this, well, I got an attitude at him, and so Mr. Thorn—Mr. Farmer interrogating me, kept interrogating, so I went on and said that Bruton was with me.

Q. Is that accurate?

A. I didn't hear you?

Q. Is that accurate or were you mad at Bruton at the time?

A. Yes.

Q. You made the phone call to the girl?

A. Yes.

Q. And where were you permitted to make that phone call from the police department?

A. From Oscar Farmer's office.

Q. And Detective Farmer permitted you to do it?

A. Yes, he did.

Q. How long did you talk to the girl?

A. Talked to her for about ten minutes.

Q. Were you mad at Bruton at the time?

A. Yes.

* * * * * * *

[fol. 66] Q. And the Commissioner advised you of your rights to have a lawyer and all that, didn't he?

A. Yes, he did.

Q. And the next day you saw Thorn?

A. Right.

Q. And did Thorn at that time tell you that you had a right to have a lawyer, the same thing the Commissioner had told you?

A. Well, no, he didn't say anything to me. He asked me about Bruton.

Q. Did he advise you of any rights that you may have had?

A. No, he didn't.

Q. Prior to his starting asking you about Bruton?

A. No, he didn't.

Q. He did not, he just started questioning you?

A. Right.

Mr. Koster: I have no further questions.

* * * * * * *

[fol. 67] Mr. Cooper: Mr. Koster, may it be stipulated that the first time he was brought before the U. S. Commissioner then was on May 4th, 1966?

Mr. Koster: May 3rd, my information.

Mr. Cooper: May 3rd, 1966? Won't the court file show that?

Mr. Koster: It should.

Mr. Cooper: May we look at it?

The Court: You may. It won't show it, I don't think.

Mr. Cooper: It won't?

The Court: They don't put it in those files, gentlemen, their record. That would show in their record when it is.

Mr. Koster: May 3rd is the date on the sheet that I have.

Mr. Cooper: May 3, 1966. All right. It may be stipulated then it was May 3, 1966, he was first brought to the Commissioner, is that right, Mr. Koster?

Mr. Koster: Correct.

Mr. Cooper: I have nothing further.

The Court: What about the date of your warrant?

Mr. Koster: The date of the warrant, I believe, was April 11th, and it was not executed until May 3rd because of the State charges, he was being held as a State prisoner.

[fols. 68-73] April 11th.

The Court: But not executed because he was a State prisoner until they dropped the State charges on May 2nd?

Mr. Koster: That's right, your Honor.

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[fol. 74] Mr. Reardon: If I may raise just briefly the question, I also feel that the statements should be suppressed. I think it is an unhealthy situation where a man has an [fols. 75-76] attorney, charged in the State court, with an armed robbery, and yet he's still prey to any investigations that you want to conduct without—around behind the lawyer's back, or around him, until after a statement is made.

Also, I think, and I would like to highlight this aspect of Evans' testimony, the threat or the statement or the suggestion that he would have to serve a good deal of time in the State of Missouri because he has a prior conviction, prior to the Western Union robbery, and that after serving that period of time the inference is given him that then he would be turned over to the Federal authorities. He doesn't come here lily white. He admits a prior conviction, but he said he had never been to the Federal courts before and the indication is given him that he can receive before this court a ten-year sentence, this would influence an individual with a prior conviction awaiting trial for an armed robbery in the State court. This type of a promise, behind or around lawyers, I think leads to what should be here suppressed admissions that are made sometime after, a good while after he is being held under State charges. I think that it is an unhealthy practice.

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[fol. 77] Mr. Koster: The Westover vs. United States, that portion of the decision deals with something very close to this, that is the one out in Kansas City, and in that situation the Court just says this, in very simple language: "We do not suggest that law enforcement authorities are precluded from questioning any individual who has been held for a period of time by other authorities and interrogated them without appropriate warning. A different case would be presented if the accused were taken into custody by this second authority, removed both in time

and place," which we have here, "from his original surroundings, and then adequately advised of his rights and given an opportunity to exercise them."

The Westover case, they had—the police had him in custody in Kansas City, the local authorities, they held him; when they got finished interrogating him the F. B. I. [fol. 78] came right in. The police had never given him any proper advice. The F. B. I. did give what the Supreme Court said was proper advice, but they said it's all one interrogation, there's no separation in time or place, and they knocked out the F. B. I. interrogation.

Here we have three days later in a different place, and he's adequately informed by a different authority. I think that this particular statement of the Supreme Court in the Westover opinion fits our situation as to April 11th and certainly as to May 4th, after he's been before the Commissioner.

* * * * * * *

[fol. 79] The Court: And insofar as anything he may have told Mr. Farmer before that date, I'm not ruling on that [fols. 80-87] because it's not involved in here, but insofar as what he said, on whatever the date that it is, in the presence of Thorn and Farmer, when Thorn questioned him, and on the time that he talked to him right after he was before the Commissioner, I think if the Government wants to refer to it in their opening statement the Court will permit him to do so.

* * * * * * *

[fol. 88] Mr. Koster: Your Honor, while we're waiting for Miss Miller to come in, Plaintiff's Exhibit 1, this is by a [fol. 89] stipulation between the parties, Mr. Reardon and Mr. Cooper, Plaintiff's Exhibit No. 1 may be introduced as an agreement showing that Paul J. Robinson is appointed contractor for a Post Office Contract Station No. 7 located at the Robinson Jewelry Company at 3809 South Kingshighway, and this appointment as a contractor is signed by Paul J. Robinson on the 1st of January, 1963.

The Court: And is in force and effect——

Mr. Koster: And is in force and effect today, your Honor. And further, Plaintiff's Exhibit No. 2 may be introduced

by agreement of the parties which shows that Shirley Miller was appointed to assist at Contract Station No. 7 on February 5, 1964, as a postal helper and entitled to handle postal funds, and that this agreement finding Shirley Miller to assist at Contract Station No. 7 is still in effect.

The Court: Very well.

(Which said Plaintiff's Exhibits 1 and 2 were received in evidence.)

SHIRLEY MILLER, being produced, sworn and examined in behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Koster:

[fols. 90-91] Q. Would you state your name, please?

A. Shirley Miller.

The Court: Young lady, would you speak up so the gentleman down on the end will have no trouble hearing you?

Q. (By Mr. Koster) Where do you live, Miss Miller?

A. 5025 South Kingshighway.

Q. Are you employed?

A. Yes.

Q. Where are you employed?

A. Robinson Jewelry Company.

Q. Where is Robinson Jewelry Company located?

A. 3809 South Kingshighway.

Q. How long have you been employed there?

A. About eight years.

Q. Is part of your employment there to assist in the running of the postal contract station?

A. Yes.

Q. Now, Miss Miller, were you working on April 16, 1965?

A. Yes.

Q. I want to direct your attention to about 2:00 o'clock or 2:30 in the afternoon of that day. Where were you at that time?

A. Working at the desk.

* * * * * * *

[fol. 92] Q. Does it indicate on there or can you indicate on there where you were seated about 2:30 on the afternoon of April 16th, 1965?

A. At the desk.

Q. Show me where that is. Would you point to it?

A. Right here (indicating).

Q. The desk is pictured on the right side of the picture, is that correct?

A. Yes.

Q. Now, when you were seated at that desk what happened? Would you tell me what happened at that time?

A. I was entering things into the book and the door opened and I looked up and there was two young men came in.

Q. Were these men white or Negroes?

A. They were Negroes.

Q. Did they come in together or one at a time?

A. Yes, they were together.

Q. What did you do then?

A. I went out to wait on them.

[fol. 93] Q. And so you went to the front of the store?

A. Yes.

Q. What happened after that?

A. One wanted to look at engagement rings.

Q. Which one wanted to look at engagement rings? Have you since learned his name?

A. Evans.

Q. Do you see him now, please?

A. He's right there, yes (indicating).

Q. Which one is he?

A. This gentleman right over here (indicating).

Q. The gentleman in the darker suit?

A. Yes.

Mr. Koster: May the record show the witness is indicating the defendant Evans?

The Court: The record may so show.

Q. (By Mr. Koster) What did Evans say?

A. He said he wanted to look at engagement rings.

Q. What did you do?

A. I showed him the one I had on hand and told him he would have to make an appointment to see more.

Q. More rings or more diamonds?

A. More diamonds.

Q. What happened?

[fol. 94] A. He said he didn't know when he would be in the neighborhood or when he would be able to come back.

Q. Had the second man said anything up to this time?

A. No, he just started to kid him then about being engaged. He said his troubles would first start now.

Q. Then what happened?

A. Then he said he wanted to look at some watches.

Q. And then what happened?

A. So he walked down toward the watch case.

Q. Is that toward the rear of the store?

A. Yes.

Q. What happened then?

A. I started down to show him some watches and the other man said something to me and I turned to answer him. When I turned around he was pulling a gun.

Q. Who was pulling a gun?

A. Evans.

Q. The second man said something to you that distracted your attention, is that what you are saying?

A. That's right.

Q. Then he turned back to Evans and he pulled the gun?

A. Yes.

Q. Where was he then?

A. He was standing over the coin case.

[fol. 95] Q. Was that in the front or rear of the store?

A. Toward the rear of the store.

Q. But still the customer portion proper of the store?

A. Yes.

Q. What happened when he pulled the gun, what did he say?

A. He pointed it, there's a little window, Mr. Robinson can look out, he pointed——

Q. Can you see that window on that picture?

A. Faintly.

Q. I'm going to show you Plaintiff's Exhibit 4 and ask you if you can see it any better on this one?

A. Yes.

Q. Would you indicate where it is?

A. It's right above Mr. Robinson's desk.

Q. Has he got kind of a workbench there?

A. Workbench, yes.

Q. How big is that window approximately?
A. Oh, I don't know.
Q. Can you show us with your hand?
A. Oh, it's about this wide, about this high (indicating).
Q. What did Evans do when he pulled the gun?
A. He pointed it through the glass at Mr. Robinson, [fol. 96] told him it was a holdup.
Q. Then what happened?
A. Mr. Robinson was on a rolling chair, and he rolled out of his sight.
Q. And then what did Evans do?
A. He tore the gate off and came around the back.
Q. The gate separates the customer portion of the store and your part?
A. That's right.
Q. And when he went around the back, what did you do?
A. I started to walk behind him.
Q. Behind Evans?
A. Yes.
Q. What happened then?
A. The second man put a gun to my face and told me to get back out in the store.
Q. Stay in front?
A. Yes.
Q. Were you facing the second man then?
A. Yes.
Q. Do you see him in the courtroom now?
A. Yes, I do.
Q. Would you indicate which one he is?
A. He's right over there (indicating).
[fol. 97] Q. Are you indicating the gentleman in the lighter gray suit and red tie?
A. Yes.
Q. Have you since learned his name?
A. Bruton, I think.

Mr. Koster: May the record show she's indicated the defendant Bruton, your Honor?
The Court: The record may so show.

Q. (By Mr. Koster) After Mr. Bruton put the gun on you what did you do?
A. He told me to stand there and I did.
Q. Were you facing him at that time?

A. Yes.
Q. How long did you remain there?
A. Just a minute or two.
Q. In the front of the store?
A. That's right.
Q. Could you see what was going on in the rear?
A. No.
Q. All right, what was the next thing that happened to you, Miss Miller?
A. He told me to go back in the store, in the back part of the store.
Q. To the work portion of the store, is that correct?
[fol. 98] A. Yes.
Q. And did you go?
A. Yes.
Q. What happened then?
A. He told me to—to get on the floor.
Q. Who told you to get on the floor?
A. Bruton.
Q. When you came to the rear of the store, to the back portion, what was the first thing you saw? What did you see?
A. Evans was going through the safe.
Q. How many safes do you have?
A. Two.
Q. Which one was he going through?
A. The one on the west wall.
Q. Is that the bigger or smaller safe?
A. That is the larger safe.
Q. They are two different sizes?
A. Yes.
Q. And where was Mr. Robinson when he came to the back of the store?
A. He was on the floor.
Q. How was he facing on the floor?
A. He was facing south.
[fol. 99] Q. Was he face up or face down?
A. Face down.
Q. Could you see his eyes?
A. No.
Q. What happened when you got to the rear of the store?
A. He told me to lay down on the floor, too.
Q. Did you lie down on the floor?

A. Yes.
Q. Which direction were you facing?
A. I was facing north.
Q. Were you face up or face down?
A. Face down.
Q. What happened after you were on the floor?
A. I heard the breaking of glass and I heard the cash register open and they took money out of it, I could hear the coins jingle.
Q. What?
A. I could hear the coins jingle.
Q. What glass was broken? Did you later discover what glass was broken?
A. In the two showcases for the rings and for the watches.
Q. After that happened what is the next thing that [fol. 100] you recall?
A. Then they tied us up.
Q. When you say "tied us up" how did they tie you?
A. They used wire on our legs and tape on our hands and arms.
Q. What position did they tie you in?
A. We were on the floor in a lying position.
Q. During the time that you were on the floor did you ever put your head up?
A. Yes.
Q. Did you ever see either one of the two men in the rear?
A. Yes.
Q. Which man remained in the rear?
A. Evans.
Q. And this glass breaking was going on in the front, is that right?
A. That's right.
Q. What happened when you put your head up?
A. Evans came over and told me to put my head down.
Q. Did he do anything with the pistol when he told you to put your head down?
A. He had it in his hand.
Q. Pardon?
[fol. 101] A. He had it in his hand.
Q. Did he point that at you?
A. Yes.

Q. How many times did that happen?
A. Twice.
Q. Twice during this you put your head up?
A. Yes.
Q. After you were tied up what happened?
A. They told us they were going to leave and we should stay there for about five minutes.
Q. And then what happened?
A. So then they left.
Q. Which door did they go out?
A. The back.
Q. They left from the rear and went out the back door. Now, what type of gun did Bruton have?
A. It was a revolver.
Q. He is the first man that put the gun on you?
A. Put the gun on me, yes, sir.
Q. What color was it do, you recall?
A. Black.
Q. Do you recall what kind of a handle it had or anything of that?
A. I couldn't see it.
[fol. 102] Q. You couldn't see the handle. Was it a large or small revolver?
A. Small.

* * * * * * *

Q. Now, prior to the time that they came in, Miss Miller, had you handled any postal funds that day?
A. Yes, I did.
Q. Would you expain what you had done with them?
[fol. 103] A. I took the money out of the cash drawer and put it in the safe, in a little small safe.
Q. Where is this cash drawer located?
A. That was on the west—on the west wall.
Q. In Plaintiff's Exhibit 6 do you see the cash drawer in there?
A. Yes.
Q. Does it show on that picture where it is?
A. Right here (indicating).
Q. What did you do with the cash you took out of there?
A. Put it in a little safe on the wall.
Q. Is that safe depicted in that picture?

A. Yes, it is.

Q. Would you show us which safe it is?

A. This one here (indicating).

Q. How much cash did you remove from the cash drawer, Miss Miller?

A. Thirty dollars.

Q. Thirty dollars in currency?

A. Yes.

Q. Was there any silver?

A. No, all bills.

Q. Where did you put it in the safe?

[fols. 104-105] A. I just put it in the bottom part of the safe.

Q. Was it in open view there if you open the safe?

A. If you opened it, yes.

Q. Now, was the safe drawer open or closed when these two men came in?

A. It was ajar.

Q. It was not locked?

A. No.

Q. After they left did you check that safe?

A. Yes.

Q. Was the money still there?

A. No.

Q. The thirty dollars was gone?

A. Yes.

Q. Do you keep the Government funds separate from the funds of the Robinson Jewelry Company?

A. Yes, we do.

Q. And this thirty dollars was Government funds?

A. That's right.

* * * * * * *

[fols. 106-107] Q. Now, when was the next time you saw him after the holdup, Miss Miller?

A. In the City Jail.

Q. In the City Jail or at a show-up?

A. In a show-up.

Q. Where did that take place?

A. The City Jail.

Q. Approximately when was it, do you recall?

A. It was about April the 8th, if I'm not mistaken, of this year.

Q. Was that any particular day?

A. Good Friday. It was a year to the day that we were held up.

Q. You were held up on Good Friday of '65?

A. That's right.

Q. And this was Good Friday of '66?

A. That's right.

* * * * * * *

[fol. 108] Q. Now, I want to direct your attention to April 25th, 1966. Did you have occasion to go to a show-up on that day, too, couple of weeks later after you saw Evans?

A. Yes.

Q. How many men were in that show-up?

A. I believe there was four in that one.

[fol. 109] Q. Did Mr. Robinson go with you that day?

A. No.

Q. Where did that show-up take place?

A. At Police Headquarters.

Q. In the same physical set-up?

A. Yes.

Q. It's a two-way mirror?

A. Yes.

Q. Did you see anybody in that show-up that you recognized?

A. Yes, I did.

Q. Who was that?

A. Bruton.

Q. Miss Miller, had you seen Bruton between April of '65 and when you identified him in April of '66 at the show-up?

A. One time.

Q. And approximately when was that, do you recall?

A. November or December of '65.

Q. And under what circumstances did you see him that time?

A. He was in a show-up.

Q. Where?

A. At the Police Headquarters.

[fol. 110] Q. Did you pick him out as the man who participated in the robbery on that date?

A. No, I thought maybe he was but I wasn't sure.

Q. What was changed about him at the time of the holdup and the time you saw him in November or December of 1965?

A. His eye had changed quite a bit.

Q. Which eye are talking about?

A. The right eye.

Q. Was there something noticeable about the eye at the time of the holdup?

A. Yes.

Q. What was that?

A. It dropped on one side and it had kind of a milky look and there was blood spots in it.

Q. The right eye?

A. That's right.

Q. Did you observe that at the time of the holdup?

A. Yes.

Q. When you saw him in the show-up in November, December of '65, had the condition of the eye changed at all?

A. Yes, it had.

Q. In what respect?

[fol. 111] A. It was cleared up a lot better.

Q. Well, in what way had it cleared up?

A. It wasn't as milky looking and the blood spots were gone.

Q. Did the eye seem to have some defect in it?

A. It had some but it wasn't as bad.

Q. All right, now, when you saw him in April of '66, this past April, was there any change in the condition of the eye at that time?

A. It looked like the one when he held us up.

Q. It was worse again?

A. Yes.

Q. The condition, is that correct?

A. That's right.

Q. Now, was there any other change in his condition between November or December show-up of 1965 and when you saw him at the show-up in April of 1966, other than the eye which you have described?

A. His face looked longer to me.

Q. When?

A. The first time.

Q. In November or December?

A. Yes.

Q. And was there any change in his appearance in April [fol. 112] as to his face?

A. Yes, he had a hat on that day. He had a hat on that day and it changed the appearance of his face.

Q. In what way did it change it as far as you are concerned?

A. It made it look shorter and stouter.

Q. Had he been wearing a hat or was he bareheaded at the time of the holdup?

A. He wore a cap.

Q. He wore a cap. Was it the same type of cap that he had in the show-up?

A. No.

Q. But just some head covering?

A. That's right.

Q. Was there anything else that changed between November or December of '65 and of this year?

A. His skin looked a little too light in November.

Q. It looked lighter?

A. Yes.

Q. What about when you saw him in April?

A. It looked about the same color then.

Q. Was there anything different in the color of the clothing he had on in the two show-ups?

A. Yes.

[fols. 113-124] Q. Would you tell us what that was?

A. When he held us up the coloring was kind of a brown, tan, and when I saw him in November it was a darker color, more of an olive color.

Q. When you saw him in April what was the color of the clothing?

A. Tan.

Q. It was closer to the——

A. Same color.

Q. At the time of the holdup?

A. Yes.

Q. Wasn't the same clothing?

A. No.

Q. Miss Miller, are you absolutely sure this is the man here?

A. Yes.

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[fol. 125] By Mr. Reardon:

Q. Miss Miller, did anyone accompany you or did Mr. [fol. 126-132] Robinson accompany you when you went to the show-up in either November or December of last year?

A. Mr. Robinson was with me.

Q. The two of you had gone. What police officers escorted you on that occasion?

A. Same ones.

Q. Same ones, that is Detective Farmer and Bradley, is that correct?

A. And Bradley, yes.

Q. How many individuals were in that particular line-up?

A. That was three.

Q. Pardon me?

A. Three.

Q. Three. Did you view that particuar show-up separately with Mr.—or together with Mr. Robinson?

A. Separately.

Q. And on that occasion you looked at the three individuals; is that correct?

A. Yes.

Q. And you failed at that time to identify anyone, is that correct?

A. That's right.

* * * * * * *

[fol. 133] Q. And so that you weren't sure at the time you identified him, picked him out in the April 25th line-up, that you had seen him in November or December?

A. I wasn't positive, no.

Q. And you talked with the officers about that?

A. Yes.

Q. Now, at the time that you viewed Mr. Bruton in the November line-up, November or December line-up, you were not sure that he was the individual that had been in the Robinson Jewelry Store on April 16th of 1965?

A. I thought it was the man but I wasn't positive.

Q. All right, and you weren't positive on April 25th that he was the same man that had been in a line-up in November or December of last year?

A. I thought it was.

Q. Now, this second person involved in the robbery, the

one that you didn't wait on, how much time did you spend out in the working portion of the jewelry store with that individual?

A. About two minutes, three minutes, something like that.

Q. Is this while the first person was in the rear with Mr. Robinson?

[fols. 134-141] A. That's right.

Q. Were you looking to the rear concerned about Mr. Robinson at that time?

A. Not all the time, no.

Q. A portion of the time?

A. Yes.

* * * * * * *

[fol. 142] Q. Now, while Evans was in the rear of the store and Bruton held you in the front, you said that was two or three minutes?

A. Yes.

Q. Did you look to the rear of the store during those two or three minutes?

A. Yes.

Q. Where did you look besides the rear of the store?

A. At Bruton.

Q. How close were you to him?

A. About as close as I am to this lady here (indicating).

Q. Were you standing?

[fols. 143-145] A. Face to face.

Q. He was facing you?

A. Yes.

Q. Where did he have the pistol?

A. Between us.

Q. Were you looking at the pistol or his face?

A. At both.

Q. You actually looked him straight in the face?

A. Yes, I did.

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[fol. 146] PAUL J. ROBINSON, being produced, sworn and examined in behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Koster:

Q. Would you state your name, please?
A. Paul J. Robinson.
Q. What is your business or occupation, Mr. Robinson?
A. Watchmaker and jeweler.
Q. Where is your store located?
[fols. 147-162] A. 3809 South Kingshighway.
Q. Aside from running a jewelry store at that location are you a contract operator for the St. Louis Post Office?
A. I am Contract Station No. 7 for the post office, yes.
Q. How long have you been operating in that capacity?
A. Oh, going on three years.
Q. And you are still a contract station operator at this time?
A. Yes, sir.
Q. Now, Mr. Robinson, I want to direct your attention to about 2:30 in the afternoon on April 16, 1965. Where were you at that time?
A. I was at my store.

* * * * * * *

[fol. 163] Q. And you cannot tell the court and jury that certainly that this defendant over here, Mr. Bruton, committed the robbery?
A. No, I can't because I didn't see him.
Mr. Reardon: Thank you.

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[fol. 164] GEORGE L. MASON, being produced, sworn and examined of the plaintiff, testified as follows:

Direct examination.

By Mr. Koster:

Q. Would you state your name, please?
A. George L. Mason.

Q. What is your business or occupation, Mr. Mason?
A. Finance examiner, post office.
Q. Mr. Mason, did you have occasion to go to Contract Station No. 7, which is located at 3809 South Kingshighway, on April 16, 1965?
A. I did.
Q. Did you perform an audit of their post office receipts and what-have-you out there?
A. I did.
Q. Do you have a copy of the audit you performed?
A. Yes.

(Plaintiff's Exhibit 7 was marked for indentification.)

Q. Mr. Mason, I'm going to hand you what has been marked Plaintiff's Exhibit No. 7 and ask you what that is, sir.
A. It's Form 1947, which is an examination of contract station or branch.
[fols. 165-166] Q. Does that reflect where that examination was made and what date?
A. On the back there is a notation, "Audit made following robbery." The date on it is 4/16/65.
Q. Now, did you personally perform that audit?
A. Yes, sir.
Q. Did you determine if anything was missing from the post office receipts down there?
A. Yes, sir.
Q. How much was missing, sir?
A. Thirty dollars thirty-four cents.
Q. Is that as of April 16th? What time did you perform that audit?
A. We have got a time on here of 6:45 p.m.
Q. April 16, 1965?
A. Right.
Q. Thirty some-odd dollars?
A. Thirty dollars thirty-four cents.

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[fol. 167] J. B. THORN, being produced, sworn and examined in behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Koster:

Q. Would you state your name, please?
A. J. B. Thorn.
Q. What is your business or occupation, Mr. Thorn?
A. I am a United States Postal Inspector.
Q. How long have you been so employed?
A. Ten years.
Q. Mr. Thorn, did you have occasion to investigate the robbery of Contract Station No. 7, the Robinson Jewelry Company?
A. Yes, sir, I did.
Q. In connection with that investigation, Mr. Thorn, I want to direct your attention to April 11, 1966. Did you have occasion to go to the St. Louis City Jail on that day?
A. Yes, sir, I did.
Q. Approximately what time did you go there?
A. It was after lunch, between 1:00—probably between 1:00 and 2:00 o'clock.
Q. Did you go with anyone else?
A. I did.
[fol. 168] Q. Who was that?
A. Detective Oscar Farmer of the St. Louis Metropolitan Police Department.
Q. When you got to the City Jail who did you see?
A. Saw William Evans.
Q. Is that the gentleman seated here in the dark suit?
A. Yes, sir.
Q. This individual here (indicating)?
A. This one sitting on the left of the table.
Q. Did you talk to William Evans at the City Jail that day?
A. I did.
Q. Did you ask him some questions?
A. I did.
Q. Did he give you some answers?
A. He gave me some answers.
Q. Did you question him about the Robinson Jewelry Contract Station No. 7 holdup?
A. I did.

Q. Will you tell me what William Evans said on April 11th?

Mr. Cooper: I object, your Honor, on the grounds that no foundation has been laid.

The Court: Lay your foundation.

[fol. 169] Q. (By Mr. Koster) Did you advise William Evans, give him any advice before you started this questioning?

A. I did.

Q. Will you tell us what you told him?

A. I first introduced myself as being a postal inspector. I then advised him of his rights, that he was a suspect in the armed robbery of Contract Station No. 7, that he was not required to make any statements, any statements that he did make could be used against him in a court of law, that he had a right to an attorney.

Q. Did you ask him if he had an attorney?

A. I did.

Q. What did he say to that, Mr. Thorn?

A. He told me he had one.

Q. Did he say what his attorney's name was?

A. He told me his attorney's name was Al Harris.

Q. Did you ask him or did you discuss his attorney Al Harris any further at that point?

A. He advised me or told me that Mr. Harris was coming to see him on that day.

Q. Later that afternoon?

A. Right.

Q. Did you question or did you ask him anything when he told you that?

[fol. 170] A. I asked him, I told him that I wanted to question him, would he prefer that I wait until Mr. Harris arrived?

Q. What did he say?

A. He told me no, that we could talk and he would tell Mr. Harris when he got there.

Q. Then you proceeded to question him about this hold-up?

A. That's right.

Q. Would you tell me what Evans said on April 11th?

Mr. Cooper: If the Court please, may we approach the bench for just a minute.

The Court: You can state just what you have to say from there.

Mr. Cooper: Again I will move formally to suppress any evidence that this man may testify to on the grounds that I set forth in my formal motion to suppress the evidence.

The Court: In order that the record may be straight, you did not present your formal motion. If you want to present it, you can present it. We had the matter this morning, we went into it, the jury is not concerned with it, that you're relying upon the testimony that we heard this morning.

Mr. Cooper: Yes, I am, this morning.

[fol. 171] The Court: Be overruled. The record can show that the formal motion is overruled, if you want it so considered.

Mr. Cooper: Yes, and also that this matter that was heard this morning outside of the hearing of the jury was on my motion to suppress this evidence by Mr. Thorn, is that correct? See, formally I didn't move that way this morning.

The Court: I understand you didn't. No, I'm not going to make your record for you now. We took it up, the record will show what we took it up on this morning. It will be based upon that record, but taking that testimony this morning with which the jury is not concerned at this particular point and considering the motion that is filed, the court will overrule it.

Q. (By Mr. Koster) Will you tell me what William Evans said on April 11th at the City Jail in your presence?

A. He stated that he participated in the armed robbery of the Robinson Jewelry Store and Contract Station No. 7.

Q. Did he say what he did with the jewelry or the money which was obtained?

A. Not at that time, sir.

Q. Did he say what happened to the guns which were used?

[fol. 172] A. No, sir.

Q. Did he say if he was alone or if anyone was with him?

A. He said there was someone with him.

Q. Did he name that individual?

A. No, sir.

Q. Is that all the information that he gave you on April 11th?

A. On that date, yes, sir.

Q. Now, did you talk to him again concerning this robbery?

A. Yes, sir.

Q. When was the next time you talked with him?

A. I believe the date was May 4th.

Q. Where did that conversation take place?

A. In the St. Louis City Jail.

Q. Was anyone else present at that time?

A. No, sir.

Q. And did you ask him some questions concerning this robbery?

A. I did.

Q. Did he give you some answers?

A. He did.

Q. Would you tell me what he said?

[fols. 173-176] A. He again admitted his participation in the robbery. He described, not fully, but in some detail the robbery.

Q. Tell me what he said, the best you can recall.

A. He stated that he and Bruton were driving around, they went by the jewelry store and thought that this would be a good one. They went into the jewelry store and looked around. After being in for a little while they went ahead with the armed robbery, the victims were tied up, the phone was disconnected, they left the building by the back door, went down the alley, crossed Kingshighway to the Famous-Barr parking lot, got into their automobile, and drove north on Kingshighway.

Q. At this time did Evans tell you what he had done with the guns in that robbery?

A. He did not.

Q. Did he tell you what happened to the jewelry or the money?

A. He told me that the jewelry was disposed of in St. Louis, nothing specific.

Q. Did you question him as to——

A. I did.

Q. And he would give you no more specifics than that?

A. That's right.

* * * * * * *

[fols. 177-183] Q. And did you tell him that anything he said would in fact be used against him?

A. I told him it could be used against him.

Q. You didn't tell him it would be?

A. No, sir, I said it could be.

[fol. 184] Q. Well, what did you say when you found out or what did you inform him when you found out that he did indeed have a State charge?

A. That there would be, the Federal charges, we could not proceed with Federal charges until some disposition was made of the State charges.

Q. In other words, that if he were to have to serve a good deal of time to the State of Missouri he would then be brought back to the Federal authorities at some date in the future, isn't that the inference he was given?

A. Not intentional, no.

Q. Would you have drawn that inference if you were in his shoes, that he would have to wait forever before he could, or wait a period of time before he could face a Federal charge?

A. I don't believe I can answer that, sir.

Q. Would that be a normal inference to draw, that he [fol. 185] would have to serve a State sentence perhaps before answering a Federal charge? Could you have drawn that inference from your conversation?

A. That is difficult. I suppose you could. I—I—I can't answer the question.

Q. Whose prisoner was he at that time on April 11th?

A. I beg your pardon?

Q. Whose prisoner was this man Evans?

A. The State.

Q. The State of Missouri?

A. Yes, sir.

Q. And what was he charged with there?

A. He was charged with an armed robbery.

Q. With an armed robbery, isn't that correct?

A. Yes, sir.

Q. Now, to be more specific and somewhat repetitious, he didn't mention the name of Bruton on that April 11th occasion, did he?

A. No, sir.

Q. Now, then, when you talked to him again on May 4th of this year, you recall that conversation?

A. Yes, sir.

Q. You testified concerning it?

A. Yes, sir.

[fol. 186] Q. What had become of the State charges at that time?

A. The State charges had been—the one State charge, I believe it's called nolle prossed.

Q. Nolle prossed?

A. Right.

Q. That is the same as dismissed?

A. Now, that I don't know.

Q. Well, I think we can agree that it was dismissed in favor of Federal prosecution, is that correct?

A. That's what the Circuit Attorney's office informed me.

Q. The Circuit Attorney for the State of Missouri, right?

A. Yes, sir.

Q. And you informed Mr. Evans of that undoubtedly on May the 4th?

A. I don't—I don't believe that I did.

Q. Would he have known that he was then no longer a prisoner of the State of Missouri?

A. Yes, sir.

Q. That he was a prisoner of the Federal Government?

A. Yes, sir.

Q. And he had been before the United States Commissioner, had he not?

[fol. 187] A. Yes, sir.

Q. And charged with this given offense?

A. Yes, sir.

Q. And the Government was not going to proceed until some disposition of the State charges?

A. They did not.

Q. Now, had you assisted him in any way in reaching a disposal of the State charges, discuss it with anyone?

A. I discussed it the first time with the Circuit Attorney's office.

Q. This is after the April 11th meeting?

A. Yes, sir, that is the only time, it was after——

Q. And then you did visit the Circuit Attorney's office?

A. I visited the Circuit Attorney's office, yes, sir.

Q. And indicated an interest on behalf of the Federal Government?

A. The Federal Government.

Q. And you do have the position that you wouldn't proceed so long as there was something pending in the State, is that correct?

A. Yes, sir.

Q. So then you went back and talked to him again after the purpose had been accomplished, the State charges disposed of?

A. I went back on May the 4th.

Q. Right, this is after he had become a Federal prisoner?

A. Yes, sir.

Q. After the Circuit Attorney had dismissed his charges?

A. Yes, sir.

Q. So that there is a dismissed robbery charge in the State of Missouri with regard to Evans at present?

A. Yes.

* * * * * * *

[fol. 191] OSCAR FARMER, being produced, sworn and examined in behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Koster:

Q. Would you state your name, please?

A. Oscar Farmer.

Q. What is your business or occupation, Mr. Farmer?

A. Detective, St. Louis Police Department.

Q. How long have you been on the St. Louis Police Department?

A. Nineteen years.

Q. Now, Detective Farmer, I want to direct your atten-
[fol. 192] tion to April 11th, 1966, to the early afternoon of April 11th, 1966. Did you have occasion to go to the City Jail that afternoon?

A. I did.

Q. Who were with you if anyone?

A. Thorn, agent——

Q. Thorn?

A. Thorn.

Q. The Postal Inspector who just testified here?
A. That's right.
Q. Who did you see in the City Jail that afternoon?
A. We saw Evans.
Q. Evans?
A. Yes.
Q. That is this young man seated here, is that correct?
A. That's right.
Q. Now, was he questioned in your presence by Thorn?
A. He was.
Q. Concerning a robbery that occurred at Robinson Jewelry Contract Station No. 7?
A. That's correct.
Q. Would you tell me what if anything Evans said about that robbery on the afternoon of April 11th, 1966?

[fol. 193] Mr. Cooper: Objection, no foundation laid.
The Court: Better lay your foundation.

Q. (By Mr. Koster) Detective Farmer, prior to the time he was questioned about this robbery did Agent Thorn tell him anything?
A. Yes, he did.
Q. What did he tell him?
A. He informed him that he didn't have to make a statement if he didn't want, he could wait for his lawyer or could——
Q. Excuse me.
A. He could acquire a lawyer before he made a statement if he wished to.
Q. What did Evans say when Thorn discussed an attorney with him?
A. He said that he had an attorney.
Q. Did he mention the man's name?
A. Yes, he did.
Q. What name did he give?
A. Al Harris.
Q. Did he say anything else about Mr. Harris at that time that you can recall?
A. Yes, he said that he had had Mr. Harris contracted and he was supposed to be there that day.
[fol. 194] Q. Did Thorn ask him if he wanted to wait for Harris?

A. Yes, he did.

Q. What did he say to that?

A. He said he just as well talk now, didn't see any use to wait.

Q. What?

A. He just as well talk to him now, didn't see any use of waiting for Mr. Harris, he would talk to him later.

Q. After this conversation then Thorn asked him about the robbery?

A. He did.

Q. What did Evans say at that time?

Mr. Cooper: Again I will object on the same grounds I raised this morning, anything that he relates would be inadmissible for the same grounds mentioned this morning.

The Court: Overruled, same ruling.

Q. (By Mr. Koster) What did Evans say to Thorn about the robbery at that point?

A. He admitted the robbery, told him that he was involved in a robbery.

Q. Did he go into any detail? Did he elaborate any more than that?

A. No, he didn't elaborate any further.

[fol. 195] Mr. Koster: I have no further questions.

Cross-examination.

By Mr. Cooper:

Q. Detective Farmer, prior to that day had you spoken to Mr. Evans?

A. Prior to the 11th?

Q. Yes, sir.

A. Yes.

Q. Had you spoken to him alone prior to April 11th?

A. No, I hadn't.

Q. Had you spoken to him in the presence of anyone prior to April 11th?

A. I had.

Q. What persons?

A. Detective Bradley.

Q. On what day had you spoken to him before April 11th?
A. On the 8th.
Q. And on that day did you also question him about this particular robbery?
A. I did.
Q. And on that day had you advised him of his rights in advance of talking to him?
A. No, I hadn't.
Q. You did not. Prior to April 11th, hadn't this man [fol. 196] denied any involvement in this robbery?
A. Yes, he had.
Q. In fact, you had spoken to him, if I'm not mistaken, twice before April 11th, and on both occasions he denied any involvement, is that right?
A. No, that is not right.
Q. Just once?
A. We hadn't questioned him relative to this particular robbery until then.
Q. Well, but before April 11th you had discussed this with him, this robbery with him, had you not?
A. Not this particular robbery.
Q. When you say he denied any involvement in this robbery, when are you saying he denied any involvement in this robbery?
A. That was on the 11th.
Q. Oh, on the 11th before talking to you and Thorn?
A. On the 8th, I beg your pardon. That was on the 8th.
Q. So you spoke to Mr. Evans on April 8th concerning this robbery too, didn't you?
A. Yes, on the 8th.
Q. And on that date he denied involvement in it, isn't that right?
A. That's right.
[fol. 197] Q. O. K. Now, incidentally, is there a reward out?
A. Yes.
Q. In this case?
A. Yes.
Q. There is?
A. Yes.
Q. Did you know that at the time you spoke to Mr. Evans on April 8th and on April 11th?
A. On the 11th, yes.

Q. On the 11th you knew about it?

A. Yes.

Q. How much is the reward?

A. I don't know.

Q. You don't know, but it is in money, is it not?

A. It is in money, yes.

Q. Now, on April 11th when you and Mr. Thorn questioned Mr. Evans, were you aware of a State charge involving a Western Union robbery?

A. I was.

Q. Was that brought into the discussion between you and Mr. Evans and Mr. Thorn?

A. Yes, it was.

Q. And was anything mentioned concerning some assistance by either you or Mr. Thorn to try to get that State [fols. 198-200] charge dropped?

A. On the 11th, no.

Q. Well, what was said concerning the State charge on that Western Union robbery on April 11th?

A. Mr. Thorn, I don't recall exact words, but it was to the effect that the State charge would have to be dropped before the Federals would take over.

Q. And is that the only thing that was mentioned concerning this?

A. Yes.

Q. And in fact the State charge was dropped, was it not, later on?

A. As I gather, yes, as I heard.

Q. Did you assist in having that State charge dropped?

A. No, I didn't.

Q. Did Mr. Evans at any time ever tell you he didn't want to talk about this?

A. No, he didn't.

Q. After he denied involvement in it on April 8th, why did you continue to talk to him after he denied involvement in it?

A. Well, he was shown up to the victims and they identified him, and then we talked to him again.

* * * * * * *

[fols. 201-234] MORNING SESSION, TUESDAY, JUNE 21, 1966

Pursuant to adjournment as aforesaid, at 10:00 o'clock a.m. of said Tuesday, June 21, 1966, the court met, present and presiding as before, and the trial continued as follows:

The Court: Gentlemen of the jury, I would like to say to you at this time yesterday there was testimony here with respect to a statement made by the defendant Evans to Thorn, the Postal Inspector, in the presence of, at least in one instance, in the presence of the Detective Farmer, and some reference to a second statement that was made only in the presence of Thorn. That statement, which I will instruct you about in the instructions, if used, can only be used against the defendant Evans. It is hearsay insofar as the defendant George William Bruton is concerned, and you are not to consider it in any respect with respect to the defendant Bruton, because insofar as he is concerned it is hearsay.

• • • • • • •

[fols. 235-243] (Whereupon, the court charged the jury as follows:)

[fol. 244] A confession is an admission by a defendant of all the material facts constituting the crime charged. The very nature of a confession requires that the circumstances surrounding it be subjected to careful scrutiny always, in order to determine surely whether the confession was voluntarily and intentionally made.

If the evidence in the case does not convince beyond a reasonable doubt that a confession was made voluntarily and intentionally, the jury should disregard it entirely. On [fol. 245] the other hand, if the evidence in the case does show beyond a reasonable doubt that a confession was in fact voluntarily and intentionally made by a defendant, the jury should consider it as evidence in the case against the defendant who voluntarily and intentionally made the confession.

A confession made outside of court by one defendant may not be considered as evidence against the other defendant, who was not present and in no way a party to the confession. Therefore, if you find that a confession was in fact voluntarily and intentionally made by the defendant Evans, you should consider it as evidence in the case against

Evans, but you must not consider it, and should disregard it, in considering the evidence in the case against the defendant Bruton.

You are instructed that if you find and believe from the evidence that the defendant, William James Evans, was not apprised of his right to remain silent prior to making any statements concerning the charges set out in the indictment, or if you find and believe from the evidence that the defendant, William James Evans, was not apprised of his right to have counsel at the time he made any such statements mentioned in the evidence, or if you find and believe from the evidence that the statements made by the defendant, William James Evans, wherein he admitted the charges set out in the indictment were only made in return for a promise made by J. B. Thorn, or if you find and believe from the evidence that defendant, William James [fols. 246-250] Evans, was interrogated by a J. B. Thorn or Oscar Farmer despite the fact that he did not voluntarily wish to make any statements to such men, or if you find and believe from the evidence that this defendant was not allowed to consult with his attorney nor permitted to have his attorney present at the time of making any of the statements mentioned in the evidence, then you must not consider the confession and other statements made by this defendant to Thorn and Farmer.

All evidence relating to any admission or incriminatory statement claimed to have been made by a defendant outside of court should be considered with caution and weighed with great care.

An admission or incriminatory statement made outside of court by one defendant may not be considered as evidence against another defendant not present when the statement was made.

It is your duty to give separate, personal consideration to the cause of each individual defendant. When you do so, you should analyze what the evidence shows with respect to that individual, leaving out of consideration entirely any evidence admitted solely against some other defendant. Each defendant is entitled to have his case determined from his own acts and statements and the other evidence in the case which may be applicable to him.

* * * * * * *

[fol. 251] The Court: It's already been indicated that any [fol. 252] objection that either one of you make is applicable to both unless you want it to apply.

* * * * * * *

[fol. 253] The Court: Gentlemen, have you arrived at a verdict?

[fol. 254] The Foreman: We have.

The Court: Will you pass it forward?

The Clerk: (Reading)

"United States District Court Eastern Division,
Eastern District of Missouri

66 Cr 80 (1)

"United States of America, Plaintiff,

vs.

"William James Evans and George William Bruton,
Defendants.

"Verdict

"We, the jury in the above entitled cause, on the trial of the indictment herein, as to defendant, George William Bruton, find as follows:

"We find said defendant guilty as charged in the indictment herein."

(Signed) "Dan L. Black III, Foreman."

"Dated this 21st day of June, 1966."

The same style, same cause, second verdict form:

"We, the jury in the above entitled cause, on the trial of the indictment herein as to defendant, William James Evans, find as follows:

"We find said defendant guilty as charged in the indictment herein."

[fols. 255-256] (Signed) "Dan L. Black III, Foreman."

"Dated this 21st day of June, 1966."

The Court: Is that your verdict, gentlemen?

The Jury Members: Yes, sir.

• • • • • • •

[fols. 257-263] (Thereafter, on Friday, July 1, 1966, came again the parties and the following proceedings were had:)

The Court: United States vs: Bruton and Evans.

You gentlemen may proceed.

• • • • • • •

[fol. 264] Mr. Reardon: May it please the Court, I'm sure that the court is familiar with the motion heretofore filed on behalf of the defendant Bruton. There is a matter that I would like to draw specifically to the court's attention without quoting from decisions, the last of which, of course, was Miranda vs. Arizona, dating back, highlight of the Escobedo opinion, so forth, discussing various facets of affording a defendant procedural safeguards that are [fol. 265] deemed to be effective to secure his privilege against self-incrimination.

Basically the case turned upon individual factors, and I think that there is an interesting fact here insofar as defendant Bruton himself is concerned. He was brought before the Commissioner shortly after April 25th, at the time that he was arrested and identified by Shirley Miller, I believe her name was, the identifying witness, brought before the Commissioner on the 27th of April. Thereafter, on May 3rd he had a date before the Commission, Commissioner O'Toole, at which time, and I'm quite sure of the date, that I was present, together with Mr. Cooper, and both the defendants were brought over.

Now, the statement that was obtained from defendant Evans, which has major bearing with regard to defendant Bruton, was obtained on May 4th. This was after he became a federal prisoner, defendant Evans.

Insofar as a procedural safeguard that was given him, defendant Evans, with regard to the statement obtained on May the 4th, the court will remember from the evidence, from Thorn himself, Inspector Thorn, that it was made rather clear at the time of his first admission that the federal government, the prosecution by the federal government

would not take place until his state charges had been taken care of, or the state charge, one way or another. In other words, he would not become a prisoner of the federal gov-
[fol. 266] ernment until after he had paid his debt to the State of Missouri.

Now, then, that leaves the defendant with a clear implication, I think the court wil agree, that he's going to have to serve time for his Western Union robbery in Missouri and then come back to his Honor's court and answer for this charge, because he had been identified by two witnesses, and also had made this admission, I think at or near, on or about April 11th, or shortly thereafter. In any event, on May the 4th, after I had been before the United States Commissioner in behalf of defendant Bruton, and had obtained a setting —we didn't know whether, of course, the federal government was going to proceed by information or indictment, and after Mr. Cooper had been there, Inspector Thorn went to the city jail on May the 4th and by that time, of course, this defendant know that he was a federal prisoner, he had been before the Commissioner, the state charges had been dropped, and it was under these circumstances that he obtained a full and complete statement.

No. 1, with regard to the defendant Bruton, the statement isn't necessary; insofar as Evans is concerned the statement is obtained after the arrest of Bruton on April 25th, after there are already admissions in evidence, and obtained from defendant Evans, and so that I think that there is a severe lacking of procedural safeguards with regard to my defendant for the simple reason that Inspector Thorn went
[fol. 267] over and interviewed the man, defendant Evans, after a state charge was dropped, after he had already been identified by two people and had admitted it, and without going to the trouble of notifying either of the attorneys who would have a role in this particular case, either myself or Mr. Cooper. A warning is one thing, but certainly defendant Bruton had an interest in the statement that was obtained. I was never notified nor was Mr. Cooper. The record is absolutely silent with regard to this. You certainly have Inspector Thorn saying the fellow didn't have to make a statement, but what's in his mind? What safeguard has he given? He knows that he's already admitted the offense

on April 11th or thereabouts, and he's been identified by two people, and he knows on top of it when Thorn goes back over there that somehow, and Thorn had to be active in this by his own admission, he had to at least brought this to the attention of the Circuit Attorney's office, the state charge is dropped, so what reward can Thorn expect?

Of course, there's the statement implicating Bruton and without that statement, of course, the lawsuit as to Bruton is, of course, different. So, I think these are the facts, and I don't think—I think these are the facts, the argument, of course, is the idea of going over and getting the second statement from Evans is, of course, just to prejudice Bruton. Certainly, of course, although we didn't go through [fols. 268-270] it, I'm certain the court is well aware that Bruton had been questioned, certainly confronted with regard to it. In any event, I don't think there were adequate safeguards afforded this defendant Evans, or particularly my defendant, had I been notified, and I was already in the case by that time, so that I could have at least consulted with this man and at least tell him not to make a statement, not knowing whether or not he had indicated a desire to implicate Bruton in any way, shape or form. Any private conversation, and it had to be private, because Thorn went over there alone, and whatever Thorn may have told Evans is one thing, he says he told him he had a right to a lawyer, but, of course, I'm sure it's apparent to both individuals that there was no state charge against Evans at that time. I don't think there was adequate procedural safeguards afforded this man, all to the prejudice of defendant Bruton, and, therefore, we seek a new trial based upon the improper admission into evidence of the May the 4th statement, the May 4th statement, the second statement obtained by Farmer.

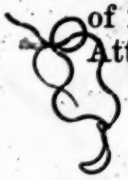
* * * * * * *

[fol. 270] Mr. Reardon: May it please the court, I do know, and I am confused with regard to the May the 3rd [fols. 271-274] date, because I checked with Mr. Cooper, we met here together, I think, on May the 10th, but I was in the case representing Bruton, as Mr. Koster indicated, on April the 29th, and it is the May 4th statement, of course,

that defendant Bruton complains of, but I am quite sure, while my dates may be wrong, I was in the case in Bruton's behalf prior to the statement Mr. Thorn obtained.

• • • • • • •

[fols. 275-279] In Cause No. 66 CR 80, United States vs. William James Evans and George William Bruton, defendant William James Evans being represented by Irving Cooper and George William Bruton by Dan Reardon, Jr., on the jury finding each of these defendants guilty to Count 1 in the indictment, it is the judgment of the court that the defendant William James Evans be committed to the custody of the Attorney General for a period of 25 years to be served in an institution designated by the Attorney General; defendant George Wiliam Bruton be committed to the custody of the Attorney General for a period of 25 years to be served in an institution designated by the Attorney General.



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PETITION FOR A WRIT OF CERTIORARI

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No. [redacted]

MAY 16 1967

JOHN F. DAVIS, CLE

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 18,490.

GEORGE WILLIAM BRUTON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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St. Louis Law Printing Co., Inc., 411-15 N. Eighth St., 63101. CEntral 1-4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 18,490.

GEORGE WILLIAM BRUTON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on March 22, 1967.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on March 22, 1967. The jurisdiction of this Court is involved under 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED.

Whether Petitioner was unduly prejudiced by the allowing into evidence within the hearing of the jury an involuntary confession, given by his co-defendant, William James Evans, to a United States Postal Inspector which implicated this petitioner as his accomplice to the charge of violating 18 U. S. C., Section 2114 (1948).

STATEMENT.

William James Evans and George William Bruton were jointly indicted, tried and convicted in the United States District Court for the Eastern District of Missouri by a jury of violating 18 U. S. C., Section 2114 (1948). Following the entry of judgment imposing the mandatory sentence of twenty-five years they duly perfected their appeals to the United States Court of Appeals for the Eighth Circuit.

Even though the Government had positive identifications of Defendant Evans by the two victims whe were at the scene, a confession, given by William James Evans to J. B. Thorn, a United States Postal Inspector, was admitted into evidence at the trial. By this confession, Mr. Evans admitted his participation in the robbery of a jewelry store and watch repair shop on South Kingshighway in St. Louis, Missouri, which was also a branch for the United States Post Department. This confession, while it described the participation of Defendant Evans in the robbery, implicated George William Bruton as his accomplice.

On appeal to the United States Court of Appeals, the respective counsels for these two Defendants argued that the United States District Court erred by denying a motion to suppress the confession on the grounds that it was given involuntarily and therefore not admissible into evi-

dence at a criminal prosecution under **Miranda v. Arizona,** 384 U. S. 436 (1966), and **Westover v. United States,** 384 U. S. 436 (1966). The Court reversed the conviction of Defendant Evans and remanded the cause for another trial, but it affirmed the conviction of Defendant Bruton. The reason for the Court of Appeals' decision was based on the fact that the confession was admitted as evidence against Evans only and that the trial court limited the purpose and the effect of the incriminating statements by its instruction that the jury consider them as evidence against Evans and not to consider them as evidence against Bruton. The United States Court of Appeals said at page 12 of its opinion:

> "To overturn Bruton's conviction we would be required to speculate that the jury, presumably composed of prudent and intelligent men, disregarded the court's instructions and their oaths."

REASONS FOR GRANTING THE WRIT.

The United States Court of Appeals for the Eighth Circuit grounds its decision sustaining William George Bruton's conviction on **Delli Paoli v. United States,** 369 F. 2d 968 (8th Cir. 1966); **Opper v. United States,** 348 U. S. 84 (1954); **Haggard v. United States,** 369 F. 2d 968 (8th Cir. 1966); **Golliher v. United States,** 362 F. 2d 594 (8th Cir. 1966); and **United States v. Gardner,** 347 F. 2d 405 (7th Cir. 1965). These five cases deal with situations wherein two or more defendants were joined in the same trial and a voluntary confession, admitted into the evidence, given by one defendant implicating another defendant in the crime for which they were being tried. The situation presented in this case, however, is not the situation involved in those cases given consideration by the Eighth Circuit Court of Appeals. Rather, in this case, Defendant Evans' confession was declared to be involuntary and therefore inadmissible as evidence in trial.

Petitioner directs the Court's attention to the case of **Greenwell v. United States**, 336 F. 2d 962 (D. C. Cir. 1964). During appellant Greenwell's trial with his co-defendant Seals, Seals' confession was admitted into evidence. At trial, Greenwell's name was deleted from the confession and "named person" substituted. In granting a new trial for Greenwell, the District of Columbia Circuit Court said at page 969:

> "But with Greenwell and Seals on trial before the same jury at the same time charged with the same crime, and with other evidence in the case connecting the co-defendants in the commission of the crime, it is difficult to believe that the jury was unable to divine who the 'anonymous nobody' referred to in the confession was. Stein v. New York, 346 U. S. 156, 194, 73 S. Ct. 1077, 97 L. Ed. 1522 (1953). Even had not a witness inadvertently mentioned Greenwell's name once in reciting Seals' confession, as did occur, the jury could well have understood that the person incriminated in Seals' admissions was the other defendant sitting next to him."

The court went on to say on the same page of its opinion:

> "We conclude that the admission of Seals' confession, **since it was improper as to Seals**, justifies the retrial of his co-defendant, Greenwell, in a proceeding in which this confession does not reach the jury, . . ." (emphasis added).

Likewise in **Anderson v. United States**, 318 U. S. 350 (1942), the Supreme Court of the United States was faced with a similar situation. Here the circumstances under which confessions were obtained from defendants rendered them inadmissible in evidence in a criminal prosecution. The Court held that convictions founded on inadmissible evidence must be set aside, even as to those co-defendants who did not give confessions. The Court said at page 357:

"There is no reason to believe, therefore, that confessions which came before the jury as an organic tissue of proof can be severed and given distributive significance by holding that they had a major share in the conviction of some of the petitioners and none at all as to the others. Since it was error to admit these confessions, we see no escape from the conclusion that the convictions of all the petitioners must be set aside."

In **Barton v. United States**, 263 F. 2d 894 (5th Cir. 1959), the Fifth Circuit Court of Appeals determined that the Federal District Court erred by it denying a motion for severance. Before trial Barton voluntarily gave a statement to a Special Agent of the F. B. I. relating that co-defendant Mitchell acted with Barton in the commission of the offense charged. This statement was then introduced into the trial as evidence against Barton with an instruction to the jury that it was not to be considered evidence against Mitchell. In finding that this statement was prejudicial to Mitchell's case, the court said at page 897:

"We have quoted the main body of Barton's statement in footnote 2, supra. It accused Mitchell of being the instigator or of acting with Barton in every detail of the commission of each offense. It would be impossible to eliminate from the statement the parts prejudicial to Mitchell and no such attempt was made. The sole reliance for Mitchell's protection was the court's instruction to the jury, several times repeated, not to treat the statement as evidence against Mitchell. Considering the substance and terms of Barton's statement, we doubt whether it was at all possible to carry out that instruction. To do so certainly would require twelve minds more perfectly disciplined than those of the average human jurors."

Also see **Schaffer v. United States**, 221 F. 2d 17 (5th Cir. 1955).

Even though the petitioner in the Barton case asked for a severance, the absence of such motion in this case does not distinguish it from **Barton v. United States**, *supra*. Mitchell had to seek a severance to protect himself from a voluntary, admissible confession given by his co-defendant which he knew existed and which he knew would be introduced as evidence at the trial. On the other hand, the Defendant Bruton in this case did not believe he would have to protect himself from prejudice, for the confession in this case was involuntary and therefore not admissible in trial as evidence against the declarant. Before trial, a person accused of a crime is not obligated to defend against violations, at trial, of the rules of evidence, for such would be a denial of the fundamental ideas of fairness implicit within the notion of "due process." A defendant has a right to assume that the laws of evidence will be applied during the course of his trial.

The Eighth Circuit Court of Appeals found that the evidence against Defendant Bruton was sufficient to sustain his conviction even if his co-defendant's confession had not been introduced into evidence. This is begging the question. The evidence, apart from his confession, introduced to prove the case against Evans was more substantial than that introduced to prove the case against Bruton, yet the Government saw fit to introduce this confession to insure the declarant's conviction. This question was decided in **Fahey v. Connecticut**, 375 U. S. 85 (1963), wherein the United States Supreme Court reversed a conviction because inadmissible evidence was introduced at the trial, even though the evidence which was admissible was sufficient to sustain the conviction. The Court said on pages 86 and 87 of its opinion:

> "We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable

possibility that the evidence complained of might have contributed to the conviction."

Certainly there is a reasonable possibility that the involuntary and inadmissible confession given by Evans contributed to the conviction of George William Bruton.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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U. S. Court of Appeals
For the Eighth Circuit.

No. 18,489.

William James Evans,
Appellant,
v.
United States of America,
Appellee.

No. 18,490.

George William Bruton,
Appellant,
v.
United States of America,
Appellee.

Appeals from the United States District Court for the Eastern District of Missouri.

[March 22, 1967.]

Before Matthes, Lay and Heaney, Circuit Judges.

Matthes, Circuit Judge.

William James Evans and George William Bruton were jointly indicted, tried and convicted by a jury of violating 18 U. S. C., § 2114 (1948).[1] Following the entry of judg-

[1] 18 U. S. C., § 2114 (1948), provides in pertinent part:

"Whoever assaults any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin [the same] * * * or robs any such person of mail matter, or of any money, or other property of the United States, * * * or puts his life in jeopardy by the use of a dangerous weapon, * * * shall be imprisoned twenty-five years."

ment imposing the mandatory sentence of twenty-five years they duly perfected their appeals to this Court.

The focal and crucial point both in the district court and on appeal is the admissibility into evidence of two oral confessions made by the defendant Evans. Both confessions were made prior to *Miranda v. Arizona*, 384 U. S. 436 (June 13, 1966). Trial, however, commenced on June 20, 1966; hence *Miranda* is applicable and controlling. *Johnson v. New Jersey*, 384 U. S. 719 (June 20, 1966).

We first give attention to the offense which was established by uncontradicted evidence.[2]

Paul J. Robinson operated a jewelry store and watch repair shop on South Kingshighway in St. Louis, Missouri. His place of business was also a contract station or branch for the United States Post Office Department, and postal services were offered to the general public. Miss Shirley Miller was, on the date in question, and had been for some time prior thereto, an employee in the store and contract station. At approximately 2:00 P. M. on Good Friday, April 16, 1965, two Negro men entered the establishment and while Miss Miller was waiting on them each drew a gun, pointed it towards Miss Miller, and ordered her to the rear of the premises. Robinson was working in the store behind a partition. He was nevertheless able to see and observe the men through a small window in the partition. Both Robinson and Miss Miller were commanded by their assailants, at gunpoint, to lie on the floor face down behind the partition. Their legs and arms were bound. Glass showcases were broken and a safe containing Government property was opened. Various articles of merchandise and more than thirty dollars in Government money were taken by the robbers. The victims later were able to free themselves and report the holdup to the police.

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[2] Neither defendant testified nor offered any evidence during the trial.

Robinson's place of business was located in an area occupied almost exclusively by white persons and was infrequently patronized by Negroes. Miss Miller testified that the individual identified as defendant Evans had been in the store about eight times during the period of a year and one-half prior to the offense. Robinson stated he had sold Evans stamps on the Monday prior to the holdup. In this setting both Robinson and Miss Miller had no difficulty whatever in promptly and positively identifying Evans on April 8, 1966, when they viewed him in a line-up at the St. Louis Police Headquarters. Only Miss Miller, however, identified Bruton in a later line-up conducted on April 25, 1966. Robinson, "Who just saw him [Bruton] come in" and did not see him again while the robbery was in progress, was unable to positively identify Bruton.

At the threshold of the trial the court conducted a hearing out of the presence of the jury for the purpose of determining the voluntariness of certain incriminating statements elicited from Evans during a police interrogation. This procedure comports with the rule prescribed in *Jackson v. Denno*, 378 U. S. 368 (1964). Evans also objected to the admissibility of his incriminating statements during the course of the trial.

The preliminary hearing conducted by the court revealed that Evans was arrested on March 22, 1966 and detained for a period of nearly two weeks prior to the first interrogation by local officials. At police headquarters, on April 4, 1966, Detective Oscar Farmer, of the St. Louis Metropolitan Police Department, interrogated Evans in general about various robberies in the city, but did not specifically question him as to his participation in the Robinson postal robbery. He testified that prior to the interrogation he advised Evans only of his right to have an attorney and was informed by Evans that an attorney already represented him.[3]

[3] Neither party attempted to elaborate as to the nature of the warning given to Evans on April 4th. Notwithstanding the fact

Farmer continued his interrogation of Evans on April 8, 1966 after Evans had been positively identified by Robinson and Miss Miller as one of the participants in the postal robbery. Concededly, no warning of any type was given to Evans on this date. Evans repeatedly denied involvement in the robbery during the first two interrogation sessions conducted on the 8th, the second of which transpired in the presence of Miss Miller and Robinson. Evans, however, finally admitted his participation during the third period of questioning later that day. Only subsequent to these admissions did Farmer discuss with Evans the possibilities of dropping current state charges involving a Western Union robbery in favor of Federal prosecution. The record is totally silent as to the manner of interrogation, and consequently, we do not infer that Evans' confession was a product of his own voluntary purge of conscience rather than the result of Farmer's psychological pressure during the repeated interrogations.

Following Evans' admissions on the 8th, Farmer contacted J. B. Thorn, a United States Postal Inspector, who subsequently conducted his own interrogation of Evans in the city jail on April 11, 1966 in the presence of Farmer. Farmer admittedly revealed to Thorn prior to this date the fact that Evans had confessed his role in the crime during the April 8th interrogation and that he had been positively identified by Robinson and Miss Miller. The inference is clear that Farmer desired Evans to reiterate his former admissions of guilt in the presence of Thorn and himself. Thorn's questioning focused specifically on the robbery of the postal station. His testimony, however, corroborated in substance by Farmer, indicated that he gave Evans the following preliminary warning:

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that Evans explicitly denied the existence of any such warning on that date, we nevertheless feel justified in concluding that the warning in its limited form fell far short of the constitutional standards set forth in *Miranda, supra.*

"I told him that he was a suspect in this matter, that he was not required to give any statements, in fact, he was not required to talk to me, that any statements he gave could be used against him in a court of law, and that he further had the right to an attorney."

The discussion between Thorn and Evans then centered on whether Evans was presently represented by counsel. Evans then named his attorney, but in Thorn's opinion gave no indication that he wished to consult with him prior to being interrogated. Thorn's testimony, categorically denied by Evans during the preliminary hearing, indicated Evans' apparent willingness to submit to the interrogation process without the assistance of counsel:

"* * * Mr. Evans stated that Mr. Harris [Evans' attorney] was coming to see him on that particular day. I asked him if he would rather that I wait until Mr. Harris came to the City Jail. He stated no, that we could talk and that he would give Mr. Harris the information."

The Thorn interrogation of April 11th similarly culminated in Evans' admission that he was implicated in the robbery of the postal contract station. Thorn and Farmer again discussed the possibilities of dropping state charges in favor of a Federal prosecution. Although the record appears somewhat ambiguous as to exactly what point in time this discussion took place, Thorn did testify that he believed it transpired subsequent to the time Evans implicated himself in the robbery.

A complaint was filed on April 11, 1966 with the United States Commissioner charging Evans with robbery of the postal contract station. A warrant of arrest was issued by the Commissioner on the same day, but was not executed until May 3rd, the day after the state charges against Evans were dropped and he was released from state custody. Pursuant to Rule 5(a), Fed. R. Crim. P., Evans

was brought before the United States Commissioner on May 3, 1966, at which time it is agreed he was fully advised as to his rights. At Evans' request the case was continued until May 10, 1966. On May 11, 1966 the indictment under which Evans and Bruton were tried was returned and filed with the district court.

On May 4th, Thorn conducted a subsequent interrogation of Evans. This interview likewise proved fruitful in that Evans again described his participation in the robbery in some detail and implicated Bruton as his accomplice.

At the conclusion of the hearing on the motion to suppress, the district court was of the opinion that the failure of Detective Farmer to advise Evans of his rights on April 8th, prior to the confession obtained by Farmer, was totally irrelevant. The only reason expressed by the court for permitting the confession to be introduced was the following:

> "I think Mr. Thorn advised him of his rights, and as to what he told Mr. Thorn at that time, I think it's admissible. Not getting back into what he may have told Farmer at some other time, because that doesn't have anything to do with it."

In addition the record fails to disclose any finding that Evans had knowingly and intelligently waived the right to have his attorney present during the interrogation by Thorn. An essential element of voluntariness is an effective waiver by the accused of his right to retained or appointed counsel. As *Miranda* teaches:

> "If the interrogation continues without the presence of an attorney and a statement is taken, 'a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-inerimination and his right to retained or appointed counsel. *Escobedo* v. *Illinois*, 378 U. S. 478, 490, n. 14. This Court has always set high standards of proof for the waiver of constitu-

tional rights, *Johnson* v. *Zerbst*, 304 U. S. 458 (1938), and we re-assert these standards as applied to in-custody interrogation." 384 U. S. at 475.

It is doubtful, moreover, whether the court's limited finding in regard to the issue of voluntariness meets the test promulgated in *Jackson* v. *Denno:*

> "Where pure factual considerations are an important ingredient, which is true in the usual case, appellate review in this Court is, as a practical matter, an inadequate substitute for a full and reliable determination of the voluntariness issue in the trial court and the trial court's determination, pro tanto, takes on an increasing finality. The procedures used in the trial court * * * must, therefore, be fully adequate to insure a *reliable and clear-cut determination* of the voluntariness of the confession, including the resolution of disputed facts upon which the voluntariness issue may depend" (Emphasis supplied). 378 U. S. at 390-91. See also *Sims* v. *Georgia*, ... U. S. ... (January 23, 1967).

In summary, the district court was required to make a finding on the record with "unmistakable clarity" that (1) the *Miranda* warnings were given; (2) the defendant knowingly and intelligently waived his privilege against self-incrimination (see 384 U. S. at 475); (3) the defendant voluntarily, knowingly and intelligently waived his right to have retained or appointed counsel present at the interrogation; (4) the confession or statement was freely and voluntarily made.

But quite apart from the inadequacy of the court's findings, for reasons stated below, we believe the confessions obtained by Thorn are invalid as a matter of law and should not have been admitted into evidence.

In reaching this decision we are mindful that the pivotal question is whether the circumstances attending Evans' detention by the local police and his confession of April 8th,

prior to any warning of his right to remain silent, bring this case within the teachings of *Westover* v. *United States*, 384 U. S. 436 (1966), a companion case to *Miranda*, where the Supreme Court struck down a confession given to the F. B. I. authorities following an interrogation by local officials.

There is present in this case one circumstance, absent in *Westover*, which militates in favor of the validity of the confessions which were received into evidence. There was a lapse of three days between the time Detective Farmer obtained the concededly invalid confession (April 8th) and the time Inspector Thorn, after proper warning, obtained the second confession (April 11th). In *Westover* the interrogation by the F. B. I. began immediately after the interrogation by the local officers had ceased. The Supreme Court viewed this as a "continuous period of questioning", the effect being that the defendant was not adequately warned of his right against self-incrimination until the very end of the interrogation process.

The Supreme Court in *Westover* noted, however, that a different result would have been warranted if the "accused were taken into custody by the second authority, removed *both in time and place* from his original surroundings, and then adequately advised of his rights and given an opportunity to exercise them." (Emphasis supplied.) 384 U. S. at 496.

The interval of three days may be sufficient to warrant a finding that Evans had been "removed in time * * * from his original surroundings" when he was questioned by Inspector Thorn, but he was clearly still in the custody of local authorities during Thorn's interrogation. This fact, together with Farmer's continuous presence during the interrogation of April 11th, prevented the effective removal of Evans from his original surroundings.[4]

[4] Evans was interrogated by Farmer when the first confession was obtained at the police headquarters. He was again interrogated

There are other compelling circumstances which militate against the validity of the confessions. Evans had been detained in jail continuously for a period of two weeks and three days (March 22nd to April 8th) and, absent any warnings of his rights, had been subjected to at least three interrogations by local officers before he finally confessed to Farmer. He had been a prisoner two weeks and six days before he was adequately advised of his rights. More significant, however, in our view is the circumstance, not present in *Westover*, that Evans had made his inculpatory statements prior to his confrontation with Federal authorities on April 11th. Thus, at the time the warnings were given and the confession relied upon by the Government was obtained, Evans had already fully revealed his involvement in the robbery. As Justice Jackson aptly stated in *United States v. Bayer*, 331 U. S. 532 (1947):

> "Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first." 331 U. S. at 540.

We have studiously pondered the question before us and cannot escape the conclusion that the Federal authorities were, under the teachings of *Westover*, "the beneficiaries of the pressure applied by the local in-custody interrogation." Of course, if Evans had been timely and fully apprised by the local officers of his constitutional right to remain silent in accordance with the rules promulgated by *Miranda*, the incriminating statements later

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by Thorn in the presence of Farmer at the city jail. This difference was not meaningful. Evans was on both occasions a prisoner and the atmosphere on April 11th was no different than it was on April 8th.

given to Thorn would be invulnerable to constitutional attack.

While we cannot escape the feeling that there was independent, corroborating evidence which strongly suggested the guilt of Evans, we are nevertheless mindful of the Supreme Court's observation in *Miranda, supra:*

> "Dealing as we do here with constitutional standards in relation to statements made, the existence of independent corroborating evidence produced at trial is, of course, irrelevant to our decisions." 384 U. S. note 52, at 481. See also *Jackson v. Denno,* 378 U. S. 368, 376 (1964).[5]

The totality of the circumstances impel us to hold that the confessions before the jury were tainted and infected by the poison of the prior, concededly unconstitutional confession obtained by the local officer. Our decision, however, is limited to the facts before us and should not be interpreted as a per se rule that would prevent law enforcement officers of one jurisdiction from interrogating an individual who has been detained and questioned by other authorities for a period of time without appropriate warnings. The Supreme Court has stated as much in *Westover,* 384 U. S. at 496. Questions of this nature must be decided on an ad hoc basis. On this record we hold that there was a causal relationship between the unconstitutional confession and the later incriminating statements which were imparted to the jury. This being the situation, a reversal of Evans' conviction is required.

We affirm Bruton's conviction. It should be noted that this defendant at no time moved for a severance as authorized by Rule 14, Fed. R. Crim. P. Perhaps Bruton proceeded on the theory that it was to his tactical ad-

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[5] In view of the cogent, independent evidence against Evans and in light of the teachings of *Miranda,* we are caused to wonder why the Government prosecutor offered the statements as evidence.

vantage to be tried jointly, inasmuch as the evidence relating to his identification was weaker than that pertaining to Evans, and for the additional reason that the confessions were admitted solely as evidence against Evans. Be that as it may, the question is now presented whether Bruton's rights were prejudiced by admission of the invalid statements hereinabove discussed.

The district court in its instructions, to which no exception was taken, explicitly limited the purpose and effect of the incriminating statements made by Evans.[6] The rule is firmly established that in a joint trial, an incriminating statement made by one defendant which would implicate

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[6] After the Government had rested, the court cautioned the jury as follows:

> "Gentlemen of the jury, I would like to say to you at this time yesterday there was testimony here with respect to a statement made by the defendant Evans to Thorn, the Postal Inspector, in the presence of, at least in one instance, in the presence of the Detective Farmer, and some reference to a second statement that was made only in the presence of Thorn. That statement, which I will instruct you about in the instructions, if used, can only be used against the defendant Evans. It is hearsay insofar as the defendant George William Bruton is concerned, and you are not to consider it in any respect with respect to the defendant Bruton, because insofar as he is concerned it is hearsay."

In its formal charge to the jury the court again instructed:

> "A confession made outside of court by one defendant may not be considered as evidence against the other defendant, who was not present and in no way a party to the confession. Therefore, if you find that a confession was in fact voluntarily and intentionally made by the defendant Evans, you should consider it as evidence in the case against Evans, but you must not consider it, and should disregard it, in considering the evidence in the case against the defendant Bruton.
>
> * * * * * * * *
>
> It is your duty to give separate, personal consideration to the cause of each individual defendant. When you do so, you should analyze what the evidence shows with respect to that individual, leaving out of consideration entirely any evidence admitted solely against some other defendant. Each defendant is entitled to have his case determined from his own acts and statements and the other evidence in the case which may be applicable to him."

another defendant is admissible into evidence only against the declarant. The corollary of this rule is that the admission into evidence of a co-defendant's statement, under proper cautionary and limiting instructions, will not necessarily require a reversal of the conviction of the other defendant. *Delli Paoli v. United States*, 352 U. S. 232 (1957); *Haggard v. United States*, 369 F. 2d 968, 975 (8th Cir. 1966); *United States v. Gardner*, 347 F. 2d 405, 406-07 (7th Cir. 1965), *cert. denied* 382 U. S. 1015 (1966). As we have noted, the effect of Evans' incriminating statements and the purpose for which they were admitted were outlined to the jury on two occasions in clear, concise and understandable language. The court carefully confined the scope of the statements. To overturn Bruton's conviction we would be required to speculate that the jury, presumably composed of prudent and intelligent men, disregarded the court's instructions and their oaths. The Supreme Court has expressed similar sentiments in dealing with this very question:

> "To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions." *Opper v. United States*, 348 U. S. 84, 95 (1954).

See also *Delli Paoli v. United States, supra*, at 242, and *Golliher v. United States*, 362 F. 2d 594 (8th Cir. 1966), where we stated:

> "We must assume the jury was capable of assessing the evidence and followed the instructions of the court as they are bound to do by their oath." 362 F. 2d at 603.

The evidence designed to establish Bruton's guilt, wholly apart from Evans' statements, is, in our view, necessarily a factor to be considered in determining whether there is

a sound basis for deciding that admission of the statements into evidence did not affect the substantial rights of Bruton.

Inasmuch as Bruton challenges the sufficiency of the evidence to sustain his conviction, we have carefully analyzed the evidence against him.[7] The fact question before the jury turned on the identification of Bruton. Although this important element was established by only one of the victims, Miss Miller, her uncontradicted testimony provided the jury with convincing proof of Bruton's participation in the crime.[8]

We need not recount in detail Miss Miller's testimony relating to this aspect of the case. It is sufficient to say that after her face to face encounter with Bruton during the holdup, she was able to positively identify him at the police line-up on April 25, 1966 and again at the trial.

In summary, we are convinced (1) that there was substantial, independent evidence of Bruton's guilt; (2) that the court's instructions to the jury provided Bruton with sufficient protection so that the admission of Evans' statements, strictly limited to use against Evans, did not work to the prejudice of Bruton.

The judgment of conviction against Evans is reversed and the cause is remanded for another trial. The judgment of conviction against Bruton is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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[7] As the reviewing Court, we have considered the independent evidence of Bruton's guilt in the light most favorable to the Government. *Beatrice Foods Co. v. United States*, 312 F. 2d 29, 40 (8th Cir. 1963), *cert. denied*, 373 U. S. 904 (1963).

[8] A perceptible characteristic of Bruton was a "bad" eye. This was observed by Miss Miller during the holdup.

No. [redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1966

GEORGE WILLIAM BRUTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1771 Misc.

GEORGE WILLIAM BRUTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

The judgment of the court of appeals affirming petitioner's conviction was entered on March 22, 1967. On May 11, 1967, petitioner applied for an extension of time within which to petition for a writ of certiorari. The extension was granted by Mr. Justice White—but without prejudice to consideration of the timeliness of the petition—and the petition was filed on May 16, 1967. Since the extension was sought

more than 30 days after the entry of judgment, the petition is out of time under Rules 22(2) and 34(2) of the Rules of this Court. In any event, there is no occasion for further review.

Petitioner was convicted in the United States District Court for the Eastern District of Missouri of assaulting an operator of a Post Office Contract Station, in violation of 18 U.S.C. 2114. On July 1, 1966, he was sentenced to imprisonment for twenty-five years.

The government's evidence showed that on April 6, 1965, one Shirley Miller was an employee of Robinson Jewelry Company and was authorized to and did operate a Post Office Contract Station at that location (Tr. 88-89). At approximately 4:00 p.m., two men, later identified as petitioner and defendant Evans (Tr. 93, 96-97), entered the store, and Evans asked to look at some engagement rings (Tr. 90, 92-93). After a short discussion, Evans asked to look at some watches, and, as Miss Miller began to display the watches, both men drew guns (Tr. 93-94). Evans proceeded to a rear office, pointed his gun at Paul Robinson, owner of the store, and announced that it was a "holdup" (Tr. 95-96). Petitioner, in the meantime, restrained Miss Miller in the front part of the store at gun point (Tr. 96-97). Petitioner then directed her towards the rear of the store, where she found Robinson lying face down on the floor. She too was directed to lie down, and petitioner and Evans removed cash from the cash register and other items from display cases. Miss Miller and Robinson were

then tied up, and petitioner and Evans fled through the rear door (Tr. 97-101). A subsequent inventory revealed that more than $30 in government funds had been taken from the contract station (Tr. 102-104). Approximately one year later, Miss Miller identified petitioner in a police lineup (Tr. 108-109).[1]

Defendant Evans was arrested by local police on March 22, 1966, on a State charge in connection with a robbery of a Western Union Office (Tr. 9, 51). After he had been identified in a lineup by Miss Miller and Robinson, Detective Farmer of the St. Louis Metropolitan Police Department questioned him about his involvement in the robbery of the postal substation. On April 8, not having been warned of his right to remain silent and to assistance of counsel, Evans orally admitted his participation in that crime (Tr. 29-30, 37). On April 11, Postal Inspector Thorn interviewed Evans in the City Jail. He advised Evans of his right to remain silent and to assistance of counsel. Evans stated that he had retained counsel but that he was willing to answer questions (Tr. 3-7, 168-171). Evans again admitted his participation in the crime (Tr. 171). After Evans was brought before a United States Commissioner for a preliminary hearing, he was again interviewed on May 4 by Thorn. After being advised of his right to remain silent and to assistance of counsel, he again admitted

[1] Miss Miller testified that she had not identified petitioner at an earlier lineup because on that occasion petitioner's bad eye, which she distinctively remembered from the robbery, had cleared up. At the second lineup, the eye was in the same condition as on the date of the robbery (Tr. 108-111).

his participation, adding that petitioner was his confederate (Tr. 172-173).

A pre-trial motion to suppress the admissions, heard on June 20, 1966, was denied (Tr. 80). At trial, Detective Farmer did not testify to the admission he had obtained on April 8, but Inspector Thorn, without objection from petitioner, testified to the statements Thorn had obtained on April 11 and May 4, the latter of which implicated petitioner (Tr. 171-172, 173). At the conclusion of the government's case and again in the formal charge, the court instructed the jury that it could not consider Evans' admissions when determining the guilt or innocence of petitioner.[2]

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[2] At the conclusion of the government's case, the court cautioned (Tr. 201):

> Gentlemen of the jury, I would like to say to you at this time yesterday there was testimony here with respect to a statement made by the defendant Evans to Thorn, the Postal Inspector, in the presence of, at least in one instance, in the presence of Detective Farmer, and some reference to a second statement that was made only in the presence of Thorn. That statement, which I will instruct you about in the instructions, if used, can only be used against the defendant Evans. It is hearsay insofar as the defendant Bruton is concerned, and you are not to consider it in any respect to the defendant Bruton, because insofar as he is concerned it is hearsay.

In the formal charge, the court again instructed, *inter alia* (Tr. 245, 246):

> A confession made outside of court by one defendant may not be considered as evidence against the other defendant, who was not present and in no way a party to the confession. Therefore, if you find that a confession was in fact voluntary and intentionally made by the de-

On appeal from their convictions, the court below held that the interrogation of Evans by the local detective on April 8, when Evans first admitted his participation in the crime, did not comply with the standards prescribed in this Court's opinion in *Miranda* v. *Arizona*, 384 U.S. 436—standards applicable to this trial, which commenced on June 20, 1966. It further held that the subsequent statements made to Inspector Thorn, although made after the proper warnings had been given, were tainted by the previous admission made to Detective Farmer.[3] The court thus concluded

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fendant Evans, you should consider it as evidence against Evans, but you must not consider it, and should disregard it, in considering the evidence in the case against the defendant Bruton.

* * * *

It is your duty to give separate, personal consideration to the cause of each individual defendant. When you do so, you should analyze what the evidence shows with respect to that individual, leaving out of consideration entirely any evidence admitted solely against some other defendant. Each defendant is entitled to have his case determined from his own acts and statements and the other evidence in the case which may be applicable to him.

[3] This finding, which we accept for purposes of this opposition, was not, in our view, an inevitable one. As government counsel pointed out in the hearing on the motion to suppress (Tr. 77-78), this Court had stated in the *Miranda* opinion (384 U.S. at 496):

We do not suggest that law enforcement authorities are precluded from questioning any individual who has been held for a period of time by other authorities and interrogated by them without appropriate warnings. A different case would be presented if an accused were taken into custody by the second authority, removed

that all of the statements were inadmissible and remanded Evans' case for a new trial. At the same time, the court affirmed petitioner's conviction, noting that he had not moved for a severance, that there was substantial evidence of his guilt independent of Evans' admissions and that the trial court's limiting instructions had been clear and precise. This ruling was proper.

After the trial court had denied Evans' motion to suppress and ruled two of his statements admissible, petitioner could have moved for a severance under Rule 14 of the Federal Rules of Criminal Procedure. See *Barton* v. *United States*, 263 F. 2d 894 (C.A. 5); *Schaffer* v. *United States*, 221 F. 2d 17, 19 (C.A. 5). He did not.[4] Moreover, the other evidence against petitioner—which included the positive identification by Miss Miller—was clearly sufficient to convict. Finally, the court's limiting instructions, given at the conclusion of the government's case, and again in the

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both in time and place from his original surroundings, and then adequately advised of his rights and given an opportunity to exercise them.

The May 4 admission—the only one implicating petitioner—was made after Evans had had a preliminary hearing before a United States Commissioner at which he was fully apprised of his rights. We note, also, that the initial interrogation by Detective Farmer followed the *Miranda* decision by only one week—at a time, perhaps, when not all local authorities were as yet fully informed of its requirements.

[4] Petitioner suggests (Pet. 6) that he did not move for a severance because he assumed that Evans' statements were inadmissible. But this assumption must have been dispelled by the denial of the motion to suppress.

formal charge, were clear and unequivocal, and there is no indication that the jury was confused with respect to those instructions.

We stress that the government's case, lasting but two days, was simple in character, and the part of each defendant was easily understood. There was no mass trial and no proliferation of evidentiary restrictions that the jury might have had trouble understanding. The separate interests of each defendant were emphasized through the trial, each defendant being represented by his own attorney. And the statements of Evans, along with evidence of the circumstances surrounding the taking of them, were introduced at the conclusion of the government's case and were clearly segregated from the other evidence introduced against petitioner. In these circumstances, it may be presumed that the jury followed the court's instructions, and did not consider the incriminating statements in determining petitioner's guilt. *Delli Paoli* v. *United States*, 352 U.S. 232, 242; *Haggard* v. *United States*, 369 F. 2d 968, 975 (C.A. 8); *United States* v. *Gardner*, 347 F. 2d 405, 406-407 (C.A. 7), certiorari denied, 382 U.S. 1015; see, also, *Opper* v. *United States*, 348 U.S. 84.[5]

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[5] The Court of Appeals for the District of Columbia Circuit, in the exercise of its special power to make rules for that circuit, has held that it will reverse the conviction of a co-defendant if a confession by one defendant is held inadmissible. *Greenwell* v. *United States*, 336 F.2d 962 (C.A. D.C.); *Jones* v. *United States*, 342 F.2d 863 (C.A.D.C.). These decisions, although they distinguish *Delli Paoli* on the ground that the confession there was admissible, are based

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 705

GEORGE WILLIAM BRUTON,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Opinions Below

The order of the District Court denying a motion for a new trial (R. 271) is in the Appendix at page 8. The opinion of the Court of Appeals is reported at 375 F. 2d 355.

Jurisdiction

The judgment of the Court of Appeals (Appen. 16) was entered on March 22, 1967. The petition for a writ of certiorari was filed on May 16, 1967 and was granted on October 9, 1967. The jurisdiction of this Court rests on 28 U.S.C. Par. 1254(1).

Question Presented

Whether Petitioner George William Bruton was substantially prejudiced when the jury heard an illegally and unconstitutionally obtained admission of his co-defendant William James Evans which implicated the petitioner as his accomplice in the robbery of a postal contract station in violation of 18 U.S.C., Section 2114 (1948).

Statement of Case

Paul J. Robinson operates a jewelry store located at 3809 South Kingshighway in the City of St. Louis (R. 146, 147). In conjunction with his jewelry store, Mr. Robinson is a contract operator for the St. Louis Post Office, having operated for some three years as Contract Station Number 7 (R. 147). Miss Shirley Miller, an employee of the Robinson Jewelry Company for approximately eight years, assists Mr. Robinson in operating this postal contract station (R. 90). At approximately 2 P.M. on Good Friday, April 16, 1965 both Miss Miller and Mr. Robinson were at the store (R. 90, 147). Mr. Robinson was in the rear of the store repairing watches (R. 147) and Miss Miller was working at the desk in the back part of the store (R. 90, 91) as two young negroes entered the store (R. 92). Miss Miller proceeded to the front of the store to wait on the men (R. 92). The individual Miss Miller later identified as Evans (R. 93), wished to look at engagement rings. After viewing some rings, the same individual proceeded further to the rear of the store to look at some watches (R. 94). Miss Miller commenced showing some watches when this same individual was observed pulling a gun (R. 94).

Almost simultaneously the second man, later identified by Miss Miller as Bruton (R. 97) also drew a gun (R. 95). After the weapons were drawn, Miss Miller states that Evans proceeded to the rear portion of the store where Mr. Robinson was working and Bruton remained with her in the front of the store (R. 96, 97). Miss Miller testified that she remained in the front of the store facing the second man, identified as Bruton, for "just a minute or two" (R. 97). Then she was ordered to the rear of the store (R. 97). In the rear or work portion of the store both Mr. Robinson and Miss Miller were ordered to lie face down (R. 98, 99, 149). The legs and arms of each victim were then bound while lying on the floor (R. 100). The two individuals then proceeded to the safes, activity at the cash register was overheard and glass was broken in a display case (R. 98, 99). After the two men fled the scene, Miss Miller freed herself and Mr. Robinson and the police were notified of the occurrence (R. 104, 105). Approximately $30.00 in Government funds were discovered missing at this time (R. 103, 104). George L. Mason, a finance examiner for the Post Office performed an audit after the offense and set the loss at $30.34 (R. 164, 165).

On the following Good Friday, April 8, 1966, both Miss Miller and Mr. Robinson viewed a lineup at Police Headquarters and identified William Evans (R. 106, 108, 152, 153). On April 25, 1966, Miss Miller identified George W. Bruton in a lineup of four (R. 108, 109), although she failed to identify the same Mr. Bruton when she viewed a lineup of which he was a member in November or December, 1965 (R. 126).

Miss Miller and Mr. Robinson both stated that they had seen Evans in the store as a customer prior to the robbery

(R. 105, 151). Miss Miller had never seen the individual identified as Bruton prior to the time of the offense (R. 130), and Mr. Robinson could not identify Mr. Bruton as the second individual involved as he didn't see him (R. 163).

Subsequent to this postal robbery, William James Evans was charged with robbery in the First Degree of a Western Union office by the State of Missouri on March 23, 1966 and he was confined in the St. Louis City Jail. Several days before April 8, 1966, Detectives Farmer and Bradley of the St. Louis Metropolitan Police had brought Miss Miller photographs of Evans (R. 116), and at that time she identified him as one of the participants (Fol. 117). Detective Farmer had questioned Evans on April 4, 1966, at the City Jail, at which time Farmer learned that Evans was represented by an attorney, Alfred Harris (R. 33).

On April 8, 1966, Evans was placed in a lineup viewed by Mr. Robinson and Miss Miller and he was identified as a participant in the robbery of Post Office Contract Station No. 7 (R. 106-107). On this same day during three separate interviews, Detectives Farmer and Bradley questioned Evans concerning the robbery of the Post Office Contract Station without informing him of his right to remain silent and without informing him of his right to an attorney, although Farmer was aware that Evans was represented by counsel (R. 34, 35). During the first two interrogations conducted Evans denied his involvement in the offense perpetrated at the Robinson Jewelry Company (R. 35). Finally, during the third interrogation Evans admitted his participation in the offense and implicated Bruton (R. 37).

On April 11, 1966 Detective Farmer brought Postal Inspector J. B. Thorn to the City Jail to interview Evans without informing Evans' attorney (R. 34). Evans was informed of his right to silence, and that he had a right

to counsel, but Thorn didn't advise him that his statements would be used against him (R. 177-183). At that time Thorn knew that Evans had been identified by Miss Miller and Mr. Robinson as a participant in the robbery (R. 16). Inspector Thorn then obtained an oral statement from Evans wherein he implicated himself and another in the robbery of the Post Office Contract Station (R. 171). On this same day a Federal Warrant was filed against Evans and he became a Federal prisoner on May 3, 1966 after the State of Missouri dropped its charges against him (R. 21, 49, 50).

Subsequently, on April 25, 1966, a Federal Warrant was sworn out against George William Bruton (Appen. 3) as he was identified in a lineup on that day by Miss Miller, as noted above (R. 109).

Postal Inspector Thorn then interrogated Evans again; this time on May 4, 1966 (R. 172). At this point, he confessed in detail as to the perpetration of the crime, implicating not only himself but also Bruton (R. 173-176).

During the trial of the two defendants, the Government made numerous references to Evans' confession which implicated co-defendant Bruton. In his opening statement, the Assistant United States Attorney said:

> "Thorn will testify that later, on May 4th, while Evans was confined in the St. Louis City Jail, awaiting trial on this charge, he went and re-interviewed him, and he will testify that at this time Evans told him that he had committed the robbery, that he and Bruton, Evans [sic] will testify that he and Bruton were riding around looking for a place to hold up and they got in South St. Louis, and they decided on Robinson Jewelry Store" (R. 87).

During the Direct Examination of Thorn the confession was introduced into evidence as follows:

> "He [Evans] stated that he and Bruton were driving around, they went by the jewelry store and thought this would be a good one. They went in the jewelry store and looked around. After being in for a little while they went ahead with the armed robbery, the victims were tied up, the phone was disconnected, they left the building by the back door, went down the alley, got into their automobile, and drove north on Kingshighway" (R. 173).

In the Government's closing argument it was noted:

> "Now, Mr. Cooper asked questions, 'Well, was there talk about the state charges being dropped? Was there talk about him having trouble with Bruton's girl friend?' All this. He says to Farmer and Thorn, 'I was riding around with Bruton. We were looking for a place to hold up. We decided on the jewelry store. We committed a holdup. We bound them, Bruton and I ran out the back, across the alley, back into Famous-Barr and left.' That's the statement" (R. 206).

The Government went on to add:

> "This statement (the confession) that the Court just told you is admissible is admissible to evidence, this statement is to be considered by you as evidence. The statement was made on May 4th. They want you to believe that there was some trouble between Bruton and Evans and Evans just making the statement out of sheer vengeance. But you recall that Bruton was arrested and identified as a participant in this holdup on April 25th by Miss Miller. Therefore he is already charged. He can't get him in any more trouble. So

that knocks the voluntariness or the attack on voluntariness out as far as getting vengeance on Bruton . . . " (R. 207).

Following a guilty verdict, the motions of both defendants for a new trial were denied. On appeal to the Eighth Circuit Court of Appeals, Evans' conviction was reversed on the basis of the illegality of the confession. However, it was denied that the introduction of that confession was prejudicial to Bruton's case and his conviction was affirmed (Appendix 16). It is this ruling which is appealed.

ARGUMENT

I.

The Eighth Circuit Erroneously Affirmed Petitioner Bruton's Conviction in Holding That Petitioner Was Afforded Sufficient Protection by the Trial Court's Instructions Limiting the Jury's Consideration of an Implicative Admission Illegally and Unconstitutionally Obtained From a Co-Defendant.

The United States District Court at the trial of the Petitioner and his co-defendant clearly and unequivocally cautioned the jury not to consider the Evans' admission in any respect in determining the guilt or innocence of George William Bruton. (The Eighth Circuit Court of Appeals, relying upon the instructions, based its decision upon an improper extension of *Delli Paoli* v. *United States,* 352 U.S. 232 (1957).) Speaking for the Court, Judge Mathes stated:

"The rule is firmly established that in a joint trial, an incriminating statement made by one defendant

> which would implicate another defendant is admissible into evidence only against the declarant. The corollary of this rule is that the admission into evidence of a co-defendant's statement, under proper cautionary and limiting instruction will not necessarily require a reversal of the conviction of the other defendant." 375 F. 2d 355 (1967).

The Eighth Circuit concluded that the District Court's instructions to the jury provided Bruton with sufficient protection and the Petitioner was, therefore, not prejudiced. Mr. Bruton's jury presumably performed, therefore, what Judge Learned Hand called "a mental gymnastic which is beyond, not only their powers, but anybody else's." *Nash* v. *United States* (2nd Cir.), 54 F. 2d 1006 (1932). The "sufficient protection" found by the Eighth Circuit in the cautionary instructions and the finding that Petitioner was not prejudiced was aptly characterized by Mr. Justice Jackson in a comment found in *Krulewitch* v. *United States,* 336 U.S. 440, 453 (1949) wherein he stated: "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practising lawyers know to be unmitigated fiction."

As the Court of Appeals has relied upon the teachings found in *Delli Paoli* v. *United States,* 352 U.S. 232 (1957) and three decisions emanating from Circuit Courts of Appeal, two from the Eighth Circuit, *Haggard* v. *United States,* 369 F. 2d 968 (1966) and *Colliher* v. *United States,* 362 F. 2d 594 (1966); and *United States* v. *Gardner* (7th Cir.), 347 F. 2d 405, it will be well to briefly review what the majority had to say in the *Delli Paoli* case. Delli Paoli was one of five defendants jointly tried and convicted of

conspiring to deal unlawfully in alcohol. Only Delli Paoli appealed and his principal complaint rested in the assertion that the trial court committed reversible error by admitting in evidence a confession of a co-defendant. The trial court refused to delete references to Delli Paoli but instructed the jury clearly and carefully that the confession was to be considered only in weighing the guilt of the confessor. Mr. Justice Burton, speaking for the majority, scrutinized the evidence adduced against Delli Paoli and reached the following conclusion:

> "Accordingly, we agree with Circuit Judge Learned Hand's statement made for the court below, following his own summary of the evidence of Petitioner's participation in the conspiracy:
>
> 'Not only was all this enough to connect him with the business, but the jurors could hardly have failed to find that he was in the enterprise. The whole business was illegal and carried on surreptitiously; and the possibility that unless he were a party to the venture, Pierro and Margrasso would have associated (with) him to the extent we have mentioned is too remote for serious discussion. 229 F.2d 320." 352 U.S. 232, 236.

The majority opinion is carefully predicated and conditioned upon a consideration of all of the factual circumstances. For this reason the Court weighed, as indicated, all of the evidence implicating Delli Paoli and reached the conclusion quoted above. It is therefore clearly implied that under certain circumstances the instructions alone cannot supply sufficient protection. In addition to the strength of the evidence against Delli Paoli, it is of

striking interest to note that the confession of his co-defendant Whitley was valid and not contested as illegally obtained. These two factors serve to distinguish the instant case with *Delli Paoli.*

The evidence against Petitioner Bruton, other than the confession of co-defendant Evans, constituted nothing more than a weak eye-witness identification case. The record reveals that the postal contract station was robbed by two negroes on April 16, 1965. Bruton was described by the single identifying witness, Miss Shirley Miller, as the second man in the robbery whom she had never seen prior to the date of the robbery and whom she observed for two or three minutes while the robbery was in progress. During this period of time her attention was diverted from the second man, allegedly Bruton, by her concern for the activities of the other robber and a concern for her employer. On April 8, 1966 Detective Oscar Farmer illegally obtained an admission from co-defendant Evans and this admission included "confidential" information concerning the other man involved. Thereafter, Bruton was arrested by Detective Farmer and placed in a lineup on April 25, 1966 to be viewed by Miss Miller who was escorted to police headquarters by none other than Detective Farmer himself. At this time, one year, two weeks and three days after the robbery, Miss Miller was able to make a positive identification of the Petitioner although he had been shown to her in a lineup conducted several months prior to the lineup conducted after Detective Farmer had illegally obtained "confidential" information. The interval of better than one year between the robbery and the fateful lineup suggests enough concerning the strength of the identification. Human experience establishes the inherent weakness

of the government's case. In *United States* v. *Wade,* 388 U.S. 218 (1967), Mr. Justice Brennan made the following observations concerning the nature of this type of evidence:

> " . . . identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial. The vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter once said: 'What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials.' "

Petitioner urges that in the factual setting at hand the Court's instructions limiting the applicability of Evans' confession does not provide the sufficient protection required by the majority in the *Delli Paoli* opinion. What may have been sufficient protection in the *Delli Paoli* factual situation cannot be found in the instant case. In support of this contention the Petitioner can only point to the preparation and presentation of the government's case. Prior to the identification of Bruton, Postal Inspector Thorn had obtained an admission from Evans. Why, then, should he return to re-question Evans unless he had the need and design to obtain a statement implicating Bruton? Inspector Thorn's endeavors were not left unheeded by the prosecution. The Assistant United States Attorney seized upon the opportunity to mention Bruton's name as often as possible, in fact, seventeen times while discussing the Evans' admission.

A second factor serves to distinguish the instant case from *Delli Paoli.* In *Delli Paoli* the validity of the implicating admission of the co-defendant was not questioned. With regard to co-defendant Evans' admission implicating the Petitioner, the Eighth Circuit Court of Appeals held:

> "The totality of the circumstances impel us to hold that the confessions before the jury were tainted and infected by the poison of the prior, concededly unconstitutional confession obtained by the local officer . . . .
>
> " . . . On this record we hold that there was a causal relationship between the unconstitutional confession and the later incriminating statements which were imparted to the jury. This being the situation, a reversal of Evans' conviction is required." 375 F.2d 355.

Speaking for the minority of four in *Delli Paoli,* Mr. Justice Frankfurter stated:

> "The Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds." 352 U.S. 212, 248.

In the instant case, the Government has not been deprived of the windfall of the Evans' admission with respect to Petitioner Bruton, even though the evidence was illegally obtained and resulted in a new trial being granted to Evans alone. Petitioner suggests that the instructions do not constitute an instrument of magic that can be seized upon to deprive him of a trial wherein a jury will not be exposed to unconstitutionally obtained evidence.

II.

The Correct Question Is Whether There Is a Reasonable Possibility That the Illegally Obtained Implicating Admission of a Co-Defendant Might Have Contributed to Petitioner's Conviction. The Eighth Circuit Erroneously Overlooked This Acid Test and Misconstrued Delli Paoli v. United States, 352 U.S. 232 (1957), in Affirming the Trial Court.

In addition to the two crucial factual distinctions existing between the instant case and *Delli Paoli,* Petitioner urges that the standards of *Delli Paoli* simply do not apply to the case at bar. The proper test to be applied was announced by this Court in *Fahy* v. *Connecticut,* 375 U.S. 85 (1963) wherein the Chief Justice stated:

> "We find that the erroneous admission of this unconstitutionally obtained evidence at this petitioner's trial was prejudicial; therefore, the error was not harmless, and the conviction must be reversed. We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. *The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction* (emphasis ours). To decide this question, it is necessary to review the facts of the case and the evidence adduced at trial." At 86, 87.

The "reasonable possibility" that the evidence complained of might have contributed to Bruton's conviction is demonstrated forcefully in this case. In the re-trial of Evans, a jury on June 5, 1967 found the co-defendant not guilty.

The weight the admission had in corroborating the identification evidence cannot be minimized. The effect with respect to Petitioner Bruton is clear when the weakness of his identification is brought to mind. The Eighth Circuit noted:

> " . . . the evidence relating to his (Bruton's) identification was weaker than that pertaining to Evans'." 375 F.2d 361.

The action of the Eighth Circuit in reversing as to one defendant and affirming as to another wherein the trial included evidence of illegally obtained confessions is inconsistent with the action and conclusion reached by this Court in *Anderson, et al.* v. *United States,* 318 U.S. 350 (1942) wherein jury heard illegally obtained confessions of six co-defendants who appealed their convictions along with Anderson and another defendant who did not confess. The incriminating statements of each defendant implicated all the remaining defendants, including the two who did not confess. In *Anderson* the Government urged that only the convictions of the six petitioners who had confessed should be reversed if the confessions were held inadmissible. This contention, consistent with the holding of the Eighth Circuit in the instant case, was rejected by this Court as follows:

> "Since it was error to admit these confessions, we see no escape from the conclusion that the convictions of all the petitioners must be set aside." 318 U.S. 350, 357.

Several decisions of other Circuits highlight the impropriety of the Eighth Circuit's application of the *Delli Paoli*

formula in the present factual context. An illuminating analysis of *Delli Paoli* can be found in *U. S.* v. *Daniel Bozza, et al.*, 365 F.2d 206 (2nd Cir.) 1966. Bozza was one of six defendants tried in a multi-count indictment for post office burglaries. The Government's case rested principally upon the testimony of an accomplice. In addition, the jury heard the confession of a co-defendant that implicated each defendant although the identity of each defendant as mentioned in the confession was deleted and not heard by the jury. The jury was instructed forthwith to regard the confession as evidence against the confessor alone and in his final charge to the jury, the trial court again cautioned the jury with regard to the proper and limited use of the confession. The Second Circuit stated:

> "Not even appellate judges can be expected to be so naive as really to believe that all twelve jurors succeeded in performing what Judge L. Hand aptly called 'a mental gymnastic which is beyond, not only their powers, but anybody else's' (citation omitted). . . .
>
> "The Government argues that however this may stand as a matter of good sense, *Delli Paoli* v. *United States*, 352 U.S. 232 . . . and decisions of this Court cause it to stand otherwise as a matter of law; these decisions, it argues in substance, have created a conclusive presumption that the jury will follow a proper instruction to consider a confession only against the confessor. . . .
>
> "We do not read *Delli Paoli* as going so far. Indeed, as was immediately noticed, the novelty of the decision lay not in the result but in the agreement of the five justices in the majority and the four dissenters in refusing to consider an instruction as inevitably suffi-

> cient, cf. Blumenthal v. United States, 332 U.S. 539 . . . thereby implicitly recognizing that there may be situations in which admission of a confession implicating co-defendants would be prejudicial in spite of proper instruction." Page 216.

The Second Circuit found the validly obtained confession furnished devastating corroboration of the testimony of the principal Government witness. *Delli Paoli* was not regarded as controlling and the trial court was reversed. Petitioner points out that the illegally obtained implicating admission in the case at bar provided the Government with devastating corroboration of a weak identification case.

The District of Columbia Circuit had before it a question analogous with the issue raised herein by the Petitioner. In *Greenwell* v. *United States,* 336 F.2d 962 (1964) the Appellant was tried with a co-defendant whose confession was admitted in evidence. In a separate appellate proceeding it was held that the co-defendant's confession was illegally obtained and erroneously admitted into evidence against him. The Government relied upon *Delli Paoli* which the Court properly distinguished by pointing out that in the *Delli Paoli* decision the incriminating statement was admissible while Greenwell's co-defendant's remarks were inadmissible. The Court stated:

> "We conclude that the admission of Seals' confession, since it was improper as to Seals, justifies the retrial of his co-defendant, Greenwell, in a proceeding in which this confession does not reach the jury." 336 F.2d 962, 969.

The distinction drawn in the *Greenwell* opinion with respect to *Delli Paoli* is at odds witih the Eighth Circuit's con-

struction of that same opinion in the instant case. Petitioner urges that it was erroneous to deny him a new trial while affording this relief to his co-defendant from whom admissions were illegally obtained. It is of additional interest to note that the Court in *Greenwell* recognized the correct test to be applied. The test, overlooked by the Eighth Circuit, is whether there is a reasonable possibility that the evidence complained of might have contributed to Bruton's conviction. *Fahy* v. *Conn.*, 375 U.S. 85 (1963).

Laughlin v. *U. S.*, 344 F.2d 187 (1965) is another decision inconsistent with the Eighth Circuit's disposition of the Petitioner's cause. In *Laughlin* inadmissible recordings were used by the Government against Laughlin. With this error permeating the record the District of Columbia Circuit considered whether a new trial should also be afforded Laughlin's co-defendant. The Court stated:

> "... we must now consider whether their admission requires reversal as to both appellants. The jury was carefully instructed that the recordings were only to be considered evidence against appellant Laughlin ... we cannot say that there was not a reasonable possibility that the evidence complained of might have contributed to the conviction. The Court's limiting instruction does not cure the prejudicial effect of evidence which is competent against neither Forte nor Laughlin. We therefore hold that the convictions of both appellants on each count of the indictment should be reversed" (192, 193).

Similar reasoning and the application of the *Fahy* rule would have led the Eighth Circuit to reverse Petitioner

Bruton's conviction rather than strain the thrust of *Delli Paoli*. Another opinion drawing realistic bounds upon the *Delli Paoli* holding can be found in *United States ex rel. Floyd* v. *Wilkins*, 367 F.2d 990, 2nd Circuit (1966). See also: *Ashcraft* v. *State of Tennessee*, 322 U.S. 143 (1944). *Barton* v. *United States*, 263 F.2d 894, 5th Cir. (1959).

Conclusion

Petitioner George William Bruton respectfully urges that there existed a reasonable possibility that his jury was influenced when it heard an illegally obtained statement of a co-defendant implicating him in the robbery of the postal contract station. The trial court's cautionary and limiting instructions with respect to the co-defendant's admission failed to provide Petitioner with sufficient protection. The reasonable possibility of prejudice flowing to the Petitioner is adequately demonstrated by a consideration of the innate weakness of the Government's identification case. Petitioner respectfully requests a new trial be granted and the Eighth Circuit reversed.

Respectfully submitted,

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JOHN F. DAVIS, CLERK

No. 706

In the Supreme Court of the United States

OCTOBER TERM, 1967

GEORGE WILLIAM BRUTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ERWIN N. GRISWOLD,
Solicitor General,
FRED M. VINSON, JR.,
Assistant Attorney General,
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286-234—68

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 705

GEORGE WILLIAM BRUTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (App. 16–27) is reported at 375 F. 2d 355.

JURISDICTION

The judgment of the court of appeals (App. 28) was entered on March 22, 1967. On May 11, 1967, petitioner applied for an extension of time within which to petition for a writ of certiorari. An extension until May 21, 1967, was granted by Mr. Justice White, without prejudice to consideration of the timeliness of the petition. The petition was filed on May 16, 1967, and the writ was granted on October 9, 1967.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial, petitioner and a co-defendant, William Evans, were convicted in the United States District Court for the Eastern District of Missouri of assaulting an operator of a Post Office Contract Station with a dangerous weapon, in violation of 18 U.S.C. 2114. A sentence of twenty-five years, mandatory under Section 2114, was imposed on petitioner on July 1, 1966 (App. 9, 94).

1. The contract station involved was located in the Robinson Jewelry Company (App. 61–62). The testimony at trial showed that on April 16, 1965, two men, later identified as petitioner and defendant Evans (App. 63, 65), entered the store and were waited on by Miss Shirley Miller, an employee at the store (App. 62–63). After a brief discussion, Evans pulled a gun, pointed it at Paul Robinson who was in the rear portion of the store, and announced a hold-up (App. 64–65). As Evans proceeded to the rear of the store, petitioner, brandishing a revolver, told Miss Miller to remain in the front portion of the store (App. 65, 67–68). Subsequently, Miss Miller was ordered by petitioner to the rear portion of the store, where she observed Evans going through a large safe and Robinson lying face down on the floor. She was directed to lie face down near Robinson (App. 66–67). Both Miss Miller and Robinson were tied up. While being guarded by Evans, Miss Miller heard the breaking of glass and the opening of the cash register in

the front portion of the store (App. 67). Petitioner and Evans fled through the rear door, cautioning Miss Miller and Robinson to remain on the floor for five minutes (App. 68). After freeing themselves, Robinson telephoned the police.

Approximately one year later, Miss Miller identified petitioner in a police lineup (App. 70). She had been unable to identify him at an earlier lineup held in November or December of 1965. She explained at trial that she distinctly remembered that during the robbery petitioner's right eye drooped to one side, had a milky look, and was dotted with bloody spots—a condition which was not present during the earlier lineup, but which reappeared at the later. She also explained that, at the earlier lineup, petitioner had not worn a hat, as he had at the time of the robbery, and that as a consequence, his face appeared longer at the first lineup. Moreover, at the earlier lineup, petitioner's skin appeared lighter because he was wearing lighter colored clothing (App. 70–72). Robinson, who had caught only a glimpse of petitioner, could not identify him (App. 75).

2. After the government had presented the substance of its case, it called Postal Inspector J. B. Thorn who, without objection from petitioner, testified as to two oral admissions made by Evans.[1] Thorn

[1] Defendant Evans was arrested by local police on March 22, 1966, on a State charge in connection with the robbery of a Western Union office (App. 32, 41). After he had been identified in a lineup by Miss Miller and Robinson, Detective Oscar Farmer of the St. Louis Metropolitan Police Force questioned him about his involvement in the robbery of the contract station. On April 8,

what the evidence shows with respect to that individual, leaving out of consideration entirely any evidence admitted solely against some other defendant. Each defendant is entitled to have his case determined from his own acts and statements and the other evidence in the case which may be applicable to him.

The jury returned verdicts of guilty against both defendants.

3. On appeal from both convictions, the court below held that the interrogation of Evans by the local detective on April 8, when he first admitted his involvement in the crime, did not comply with the standards prescribed in this Court's opinion in *Miranda* v. *Arizona*, 384 U.S. 436—standards applicable to this trial, which commenced on June 20, 1966. It further held the subsequent statements made to Inspector Thorn were tainted by the previous admission (App. 22–24). The court thus concluded that all of the statements were inadmissible and remanded Evans' case for a new trial. At the same time, the court affirmed petitioner's conviction, noting that petitioner had not moved for a severance, that there was substantial evidence of his guilt independent of Evans' admission, and that the trial court's limiting instructions had been clear and precise. Evans' retrial, at which his admissions were not introduced, resulted in his acquittal.

DISCUSSION

This case presents a question of difficulty which arises from pressing a generally sound principle further than we believe can be supported on the particular facts involved.

We believe that the court of appeals was correct in observing (App. 26) that "the admission into evidence of a co-defendant's statement, under proper cautionary and limiting instructions, will not necessarily require a reversal of the conviction of the other defendant." That conclusion is required by this Court's decision in *Delli Paoli* v. *United States*, 352 U.S. 232, which rejected the contention that the admission in evidence of a co-defendant's post-conspiracy confession, without deletion of references to the petitioner, required reversal of the petitioner's conviction. To hold otherwise would mean that in any case involving multiple defendants it would be necessary to try the defendants jointly, without admitting the confession of any defendant, or to conduct a separate trial as to any defendant who has made a confession. We believe that in some cases at least joint trials may be had and one or more confessions received under proper instructions without an undue risk of prejudice.[4] Indeed, "[u]nless we proceed on

[4] There are obviously cases in which an attempt to try co-conspirators *seriatim* rather than jointly would entail not only an unreasonable duplication of effort but also intolerable delay in the administration of justice. This would be true, for example, where a substantial number of defendants have participated in a common course of action or where a group of co-conspirators are involved in complicated and fraudulent financial transactions. These are situations in which individual trials would create a formidable obstacle to the administration of the criminal law. See, *e.g.*, *United States* v. *Dardi*, 330 F. 2d 316 (C.A. 2), certiorari denied, 379 U.S. 845.

the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense." *Delli Paoli* v. *United States*, 352 U.S. at 242.

Starting from this premise, it is easy to construct a logically impeccable argument that the admitted confession, in the light of the instructions given the jury, has no bearing on the case of another defendant. Since it did not harm him when it was admitted, it makes no difference that it was wrongly admitted. In the light of the reasons for its admission, and the instructions given the jury, it is simply irrelevant as far as the other defendant is concerned.

This is the ground on which the court below based its decision; and it is the ground upon which the government's brief in opposition in this case was based.

After further consideration, however, the Solicitor General has now come to the conclusion that in the circumstances of this case the *Delli Paoli* rule should not be extended that far. It is one thing to say, as *Delli Paoli* does, that a confession may be admitted against one defendant in a joint trial, with careful instructions to the jury not to consider it in weighing the evidence against another defendant. It may be recognized that this is not ideal, but it is a conclusion which this Court has found justified in the process of adjusting a number of competing considerations.

But the *Delli Paoli* rule is a generalization. In the usual case it works well. Like all such rules, though, it must be evaluated in the light of the facts of the

particular case. Here it has been determined that the confession was wrongly admitted against the first defendant and his conviction has been reversed, leading to a new trial at which he was acquitted. To argue, in this situation, that the other defendant's conviction should nevertheless stand may be to place too great a strain upon the rule—at least, where, as here, the other evidence against the second defendant is not strong.

As indicated in the Statement (*supra*, p. 3), only one witness, Miss Miller, identified the petitioner at the trial, and her identification testimony was weakened by long delay and by her failure to identify him at an earlier lineup. Inasmuch as Evans—although identified at this trial with more certainty than petitioner—was acquitted at the second trial when his statements were not introduced in evidence, we find it difficult to say with assurance that the jury in this case could not have been influenced by Evans' admissions in resolving the identification issue despite the efforts of the trial judge in his instructions to insulate petitioner from them. In the light of the relatively weak identification evidence as to the petitioner, we think precautions should have been taken to protect petitioner from the possibility of prejudice by keeping his name out of the recital of the confession. The first admission of guilt by Evans did not mention the petitioner (App. 79). When the government decided to rely not only on that first statement, but on the more detailed later statement, it should, in the circumstances of this case, have taken more care than it did to make certain

that the petitioner was not mentioned. The government, which knew that Evans had mentioned the petitioner in the second confession, could have alerted the inspector who testified as to Evans' statements to avoid all reference to the petitioner, either by name or implication.

We submit these views for the Court's consideration. It is our position that, in the light of the record in this particular case and in the interests of justice, the judgment below should be reversed and the cause remanded for a new trial. Cf. *Calvaresi* v. *United States,* 348 U.S. 961.

Respectfully submitted.

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JANUARY 1968.

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SUPREME COURT OF THE UNITED STATES

No. 705.—October Term, 1967.

George William Bruton, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[May 20, 1968.]

Mr. Justice Brennan delivered the opinion of the Court.

This case presents the question, last considered in *Delli Paoli* v. *United States*, 352 U. S. 232, whether the conviction of a defendant at a joint trial should be set aside although the jury was instructed that a codefendant's confession inculpating the defendant had to be disregarded in determining his guilt or innocence.

A joint trial of petitioner and one Evans in the District Court for the Eastern District of Missouri resulted in the conviction of both by a jury on a federal charge of armed postal robbery, 18 U. S. C. § 2114. A postal inspector testified that Evans orally confessed to him that Evans and petitioner committed the armed robbery. The postal inspector obtained the oral confession, and another in which Evans admitted he had an accomplice whom he would not name, in the course of two interrogations of Evans at the city jail in St. Louis, Missouri, where Evans was held in custody on state criminal charges. Both petitioner and Evans appealed their convictions to the Court of Appeals for the Eighth Circuit. That court set aside Evans' conviction on the ground that his oral confessions to the postal inspector should not have been received in evidence against him. 375 F. 2d 355, 361.[1] However, the court, relying upon *Delli*

[1] The trial began June 20, 1966, one week after the decision in *Miranda* v. *Arizona*, 384 U. S. 436. The Court of Appeals held,

Paoli, affirmed petitioner's conviction because the trial judge instructed the jury that although Evans' confession was competent evidence against Evans it was inadmissible hearsay against petitioner and therefore had to be disregarded in determining petitioner's guilt or innocence. 375 F. 2d, at 361–363.[2] We granted certiorari to recon-

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375 F. 2d, at 357, that *Miranda* and its companion cases were therefore applicable and controlling on the question of the admissibility in evidence of the postal inspector's testimony as to Evans' admissions. *Johnson* v. *New Jersey*, 384 U. S. 719. On April 8, 1966, St. Louis police officers, without giving Evans preliminary warnings of any kind and in the absence of counsel, obtained an oral confession during an interrogation at the city jail. The police informed the postal inspector, who interrogated Evans at the jail on April 11 and May 4, 1966; he obtained the oral confession expressly implicating petitioner on the latter date. On the merits, the Court of Appeals held, 375 F. 2d, at 361, that Evans' admissions to the postal inspector "were tainted and infected by the poison of the prior, concededly unconstitutional confession obtained by the local officer," and were therefore inadmissible under *Westover* v. *United States*, decided with *Miranda*, 384 U. S., at 494–497. On the retrial, Evans was acquitted.

[2] At the close of the Government's direct case, the trial judge cautioned the jury that Evans' admission implicating petitioner ". . . if used, can only be used against the defendant Evans. It is hearsay insofar as the defendant George William Bruton is concerned, and you are not to consider it in any respect to the defendant Bruton, because insofar as he is concerned it is hearsay."

The instructions to the jury included the following:

"A confession made outside of court by one defendant may not be considered as evidence against the other defendant who was not present and in no way a party to the confession. Therefore, if you find that a confession was in fact voluntarily and intentionally made by the defendant Evans, you should consider it as evidence in the case against Evans, but you must not consider it, and should disregard it, in considering the evidence in the case against the defendant Bruton.

. . . . . .

"It is your duty to give separate, personal consideration to the cause of each individual defendant. When you do so, you should analyze what the evidence shows with respect to that individual,

sider *Delli Paoli*. 389 U. S. 818. The Solicitor General has since submitted a memorandum stating that "in light of the record in this particular case and in the interests of justice, the judgment below should be reversed and the cause remanded for a new trial." The Solicitor General states that this disposition is urged in part because "[h]ere it has been determined that the confession was wrongly admitted against [Evans] and his conviction has been reversed, leading to a new trial at which he was acquitted. To argue, in this situation, that [petitioner's] conviction should nevertheless stand may be to place too great a strain upon the [*Delli Paoli*] rule—at least, where, as here, the other evidence against [petitioner] is not strong." We have concluded, however, that *Delli Paoli* should be overruled. We hold that, because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of Evans' confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment. We therefore overrule *Delli Paoli* and reverse.

The basic premise of *Delli Paoli* was that it is "reasonably possible for the jury to follow" sufficiently clear instructions to disregard the confessor's extrajudicial statement that his codefendant participated with him in committing the crime. 352 U. S., at 239. If it were true that the jury disregarded the reference to the codefendant, no question would arise under the Confrontation Clause, because by hypothesis the case is treated as if the confessor made no statement inculpating the nonconfessor. But since *Delli Paoli* was decided this

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leaving out of consideration entirely any evidence admitted solely against some other defendant. Each defendant is entitled to have his case determined from his own acts and statements and the other evidence in the case which may be applicable to him."

Court has effectively repudiated its basic premise. Before discussing this, we pause to observe that in *Pointer* v. *Texas*, 380 U. S. 400, we confirmed "that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him" secured by the Sixth Amendment, *id.*, at 404; "a major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him." *Id.*, at 406–407.

We applied *Pointer* in *Douglas* v. *Alabama*, 380 U. S. 415, in circumstances analogous to those in the present case. There two persons, Loyd and Douglas, accused of assault with intent to murder, were tried separately. Loyd was tried first and found guilty. At Douglas' trial the State called Loyd as a witness against him. An appeal was pending from Loyd's conviction and Loyd invoked the privilege against self-incrimination and refused to answer any questions. The prosecution was permitted to treat Loyd as a hostile witness. Under the guise of refreshing Loyd's recollection the prosecutor questioned Loyd by asking him to confirm or deny statements read by the prosecutor from a document purported to be Loyd's confession. These statements inculpated Douglas in the crime. We held that Douglas' inability to cross-examine Loyd denied Douglas "the right of cross-examination secured by the Confrontation Clause." 380 U. S., at 419. We noted that ". . . effective confrontation of Loyd was possible only if Loyd affirmed the statement as his. However, Loyd did not do so, but relied on his privilege to refuse to answer." *Id.*, at 420. The risk of prejudice in petitioner's case was even more serious than in *Douglas*. In *Douglas* we said, "Although the Solicitor's reading of Loyd's alleged statement, and Loyd's refusals to answer, were not technically testimony, the Solicitor's reading may well have been the equivalent in the jury's mind of testimony that

Loyd in fact made the statement; and Loyd's reliance upon the privilege created a situation in which the jury might improperly infer both that the statement had been made and that it was true." *Id.*, at 419. Here Evans' oral confessions were in fact testified to, and were therefore actually in evidence. That testimony was legitimate evidence against Evans and to that extent was properly before the jury during their deliberations. Even greater, then, was the likelihood that the jury would believe Evans made the statements and that they were true—not just the self-incriminating portions but those implicating petitioner as well. Plainly, the introduction of Evans' confession added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination, since Evans did not take the stand. Petitioner thus was denied his constitutional right of confrontation.

Delli Paoli assumed that this encroachment on the right to confrontation could be avoided by the instruction to the jury to disregard the inadmissible hearsay evidence.[3] But, as we have said, that assumption has since

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[3] We emphasize that the hearsay statement inculpating petitioner was clearly inadmissible against him under traditional rules of evidence, see *Krulewitch* v. *United States*, 336 U. S. 440; *Fiswick* v. *United States*, 329 U. S. 211, the problem arising only because the statement was (but for the violation of *Westover*, *supra*, n. 1) admissible against the declarant Evans. See C. McCormick, Evidence § 239 (1954); 4 J. Wigmore, Evidence §§ 1048–1049 (3d ed. 1940); Morgan, Admissions as an Exception to the Hearsay Rule, 30 Yale L. J. 355 (1921). See generally Levie, Hearsay and Conspiracy, 52 Mich. L. Rev. 1159 (1954); Note, Post-Conspiracy Admissions in Joint Prosecutions, 24 U. Chi. L. Rev. 710 (1957); Note, Criminal Conspiracy, 72 Harv. L. Rev. 920, 984–990 (1959). There is not before us, therefore, any recognized exception to the hearsay rule insofar as petitioner is concerned and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause. See *Pointer* v. *Texas*, 380 U. S. 400; *Barber* v. *Page*, *ante*, at —; *Mattox* v. *United States*, 156 U. S.

been effectively repudiated. True, the repudiation was not in the context of the admission of a confession inculpating a codefendant but in the context of a New York rule which submitted to the jury the question of the voluntariness of the confession itself. *Jackson* v. *Denno*, 378 U. S. 368. Nonetheless the message of *Jackson* for *Delli Paoli* was clear. We there held that a defendant is constitutionally entitled to have at least the trial judge first determine whether a confession was made voluntarily before submitting it to the jury for an assessment of its credibility. More specifically, we expressly rejected the proposition that a jury, when determining the confessor's guilt, could be relied on to ignore his confession of guilt should they find the confession involuntary. *Id.*, at 388–389. Significantly, we supported that conclusion in part by reliance upon the dissenting opinion of Mr. Justice Frankfurter for the four Justices who dissented in *Delli Paoli*. *Id.*, at 388, n. 15.

That dissent challenged the basic premise of *Delli Paoli* that a properly instructed jury would ignore the confessor's inculpation of the nonconfessor in determining the latter's guilt. "The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell." 352 U. S., at 247. The dissent went on to say, as quoted in the cited note in *Jackson*, "The government should not have the windfall of having the jury be influenced by evidence against a defendant which,

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237. See generally McCormick, *supra*, § 224; 5 Wigmore, *supra*, §§ 1362–1365, 1397; Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv. L. Rev. 177 (1948).

as a matter of law, they should not consider but which they cannot put out of their minds." *Id.*, at 248. To the same effect, and also cited in the *Jackson* note, is the statement of Mr. Justice Jackson in his concurring opinion in *Krulewitch* v. *United States*, 336 U. S. 440, 453: "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction. . . ."[4]

The significance of *Jackson* for *Delli Paoli* was suggested by Chief Justice Traynor in *People* v. *Aranda*, 63 Cal. 2d 518, 529, 407 P. 2d 265, 271–272:

> "Although *Jackson* was directly concerned with obviating any risk that a jury might rely on an unconstitutionally obtained confession in determin-

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[4] Several cases since *Delli Paoli* have refused to consider an instruction as inevitably sufficient to avoid the setting aside of convictions. See, *e. g.*, *United States ex rel. Floyd* v. *Wilkins*, 367 F. 2d 990; *United States* v. *Bozza*, 365 F. 2d 206; *Greenwell* v. *United States*, — U. S. App. D. C. —, 336 F. 2d 962; *Jones* v. *United States*, — U. S. App. D. C. —, 342 F. 2d 863; *Barton* v. *United States*, 263 F. 2d 894; *United States ex rel. Hill* v. *Deegan*, 268 F. Supp. 580. In *Bozza* the Court of Appeals for the Second Circuit stated:

"It is impossible realistically to suppose that when the twelve good men and women had Jones' confession in the privacy of the jury room, not one yielded to the nigh irresistable temptation to fill in the blanks with the keys Kuhle had provided and ask himself the intelligent question to what extent Jones' statement supported Kuhle's testimony, or that if anyone did yield, his colleagues effectively persuaded him to dismiss the answers from his mind." 365 F. 2d, at 215.

State decisions which have rejected *Delli Paoli* include *People* v. *Aranda*, 63 Cal. 2d 518, 407 P. 2d 265; *State* v. *Young*, 46 N. J. 152, — A. 2d —. See also *People* v. *Barbaro*, 395 Ill. 264, 69 N. E. 2d 692; *State* v. *Rosen*, 151 Ohio St. 339, 86 N. E. 2d 24.

It has been suggested that the limiting instruction actually compounds the jury's difficulty in disregarding the inadmissible hearsay. See Broeder, The University of Chicago Jury Project, 38 Neb. L. Rev. 744, 753–755 (1959).

ing the defendant's guilt, its logic extends to obviating the risks that the jury may rely on any inadmissible statements. If it is a denial of due process to rely on a jury's presumed ability to disregard an involuntary confession, it may also be a denial of due process to rely on a jury's presumed ability to disregard a codefendant's confession implicating another defendant when it is determining that defendant's guilt or innocence.

"Indeed, the latter task may be an even more difficult one for the jury to perform than the former. Under the New York procedure, which Jackson held violated due process, the jury was only required to disregard a confession it found to be involuntary. If it made such a finding, then the confession was presumably out of the case. In joint trials, however, when the admissible confession of one defendant inculpates another defendant, the confession is never deleted from the case and the jury is expected to perform the overwhelming task of considering it in determining the guilt or innocence of the declarant and then of ignoring it in determining the guilt or innocence of any codefendants of the declarant. A jury cannot 'segregate evidence into separate intellectual boxes.' . . . It cannot determine that a confession is true insofar as it admits that A has committed criminal acts with B and at the same time effectively ignore the inevitable conclusion that B has committed those same criminal acts with A." [5]

In addition to *Jackson*, our action in 1966 in amending Rule 14 of the Federal Rules of Criminal Procedure also

[5] See *Pointer* v. *Texas*, *supra*, at 405: "Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law."

evidences our repudiation of *Delli Paoli*'s basic premise. Rule 14 authorizes a severance where it appears that a defendant might be prejudiced by a joint trial.[6] The Rule was amended in 1966 to provide expressly that "[i]n ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial." The Advisory Committee on Rules said in explanation of the amendment:

> "A defendant may be prejudiced by the admission in evidence against a co-defendant of a statement or confession made by that co-defendant. This prejudice cannot be dispelled by cross-examination if the co-defendant does not take the stand. Limiting instructions to the jury may not in fact erase the prejudice. . . .
>
> "The purpose of the amendment is to provide a procedure whereby the issue of possible prejudice can be resolved on the motion for severance. . . ."[7]

Those who have defended reliance on the limiting instruction in this area have cited several reasons in support. Judge Learned Hand, a particularly severe critic

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[6] Joinder of defendants is governed by Rules 8 (b) and 14 of the Federal Rules of Criminal Procedure. "The rules are designed to promote economy and efficiency and to avoid a multiplicity of trials, where these objectives can be achieved without substantial prejudice to the right of the defendants to a fair trial." *Daley* v. *United States*, 231 F. 2d 123, 125. An important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence. See, *e. g.*, *Blumenthal* v. *United States*, 332 U. S. 539, 559–560.

[7] 34 F. R. D. 419. See generally Note, Joint and Single Trials under Rules 8 and 14 of the Federal Rules of Criminal Procedure, 74 Yale L. J. 551 (1965).

of the proposition that juries could be counted on to disregard inadmissible hearsay,[8] wrote the opinion for the Second Circuit which affirmed Delli Paoli's conviction. 229 F. 2d 319. In Judge Hand's view the limiting instruction, although not really capable of preventing the jury from considering the prejudicial evidence, does as a matter of form provide a way around the exclusionary rules of evidence that is defensible because it "probably furthers, rather than impedes, the search for truth . . . ." *Nash* v. *United States*, 54 F. 2d 1006, 1007. Insofar as this implies the prosecution ought not to be denied the benefit of the confession to prove the confessor's guilt,[9]

[8] Judge Hand addressed the subject several times. The limiting instruction, he said, is a "recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else." *Nash* v. *United States*, 54 F. 2d 1006, 1007; "Nobody can indeed fail to doubt whether the caution is effective, or whether usually the practical result is not to let in hearsay." *United States* v. *Gottfried*, 165 F. 2d 360, 367; ". . . it is indeed very hard to believe that a jury will, or for that matter can, in practice observe the admonition." *Delli Paoli* v. *United States*, 229 F. 2d 319, 321. Judge Hand referred to the instruction as a "placebo," medically defined as "a medicinial lie." Judge Jerome Frank suggested that its legal equivalent "is a kind of 'judicial lie': It undermines a moral relationship between the courts, the jurors, and the public; like any other judicial deception, it damages the decent judicial administration of justice." *United States* v. *Grunewald*, 233 F. 2d 556, 574. See also 8 Wigmore, *supra*, n. 3, § 2272, at 416.

Compare E. Morgan, Some Problems of Proof under the Anglo-American System of Litigation 105 (1956), who suggests that the use of limiting instructions fosters an inconsistent attitude toward juries by "treating them at times as a group of low-grade morons and at other times as men endowed with a superhuman ability to control their emotions and intellects." See also *Shepard* v. *United States*, 290 U. S. 96, 104; Meltzer, Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury, 21 U. Chi. L. Rev. 317, 326 (1954).

[9] In this case, however, Evans' conviction was reversed on the ground that his confessions were inadmissible in evidence even

however, it overlooks alternative ways of achieving that benefit without at the same time infringing the nonconfessor's right of confrontation.[10] Where viable alternatives do exist, it is deceptive to rely on the pursuit of truth to defend a clearly harmful practice.

Another reason cited in defense of *Delli Paoli* is the justification for joint trials in general, the argument being that the benefits of joint proceedings should not have to be sacrified by requiring separate trials in order to use the confession against the declarant. Joint trials

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against him, and on his retrial he was acquitted. In *People* v. *Aranda*, *supra*, 63 Cal. 2d, at 526, 407 P. 2d, at 270, it was said: "When, however, the confession implicating both defendants is not admissible at all, there is no longer room for compromise. The risk of prejudicing the nonconfessing defendant can no longer be justified by the need for introducing the confession against the one who made it. Accordingly, we have held that the erroneous admission into evidence of a confession implicating both defendants is not necessarily cured by an instruction that it is to be considered only against the declarant." See also *Jones* v. *United States* and *Greenwell* v. *United States*, both *supra*, n. 4.

[10] Some courts have required deletion of references to codefendant where practicable. See, *e. g.*, *Oliver* v. *United States*, 335 F. 2d 724; *People* v. *Vitagliano*, 15 N. Y. 2d 360; *People* v. *LaBelle*, 18 N. Y. 2d 405. For criticisms suggesting that deletion (redaction) from the confession are ineffective, see *e. g.*, Note, 72 Harv. L. Rev. 920, 990 (1959); Comment, 24 U. Chi. L. Rev. 710, 713 (1957); Note, 74 Yale L. J. 553, 564 (1965).

In this case Evans' confessions were offered in evidence through the oral testimony of the postal inspector. It has been said: "Where the confession is offered in evidence by means of oral testimony, redaction is patently impractical. To expect a witness to relate *X*'s confession without including any of its references to *Y* is to ignore human frailty. Again, it is unlikely that an intentional or accidental slip by the witness could be remedied by instructions to disregard." Note, 3 Col. J. of Law & Soc. Prob. 80, 88 (1967).

Some courts have promulgated rules governing the use of the confessions. See n. 4, *supra*. See also rules suggested by Judge Frank dissenting in *Delli Paoli* v. *United States*, 229 F. 2d 319, 324.

do conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial. But the answer to this argument was cogently stated by Judge Lehman of the New York Court of Appeals dissenting in *People* v. *Fisher*, 249 N. Y. 419, 432, 164 N. E. 336, —:

> "We still adhere to the rule that an accused is entitled to confrontation of the witnesses against him and the right to cross-examine them . . . . We destroy the age-old rule which in the past has been regarded as a fundamental principle of our jurisprudence by a legalistic formula, required of the judge, that the jury may not consider any admissions against any party who did not join in them. We secure greater speed, economy and convenience in the administration of the law at the price of fundamental principles of constitutional liberty. That price is too high."

Finally, the reason advanced by the majority in *Delli Paoli* was to tie the result to maintenance of the jury system. "Unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense." 352 U. S., at 242. We agree that there are many circumstances in which this reliance is justified. Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently. "A defendant is entitled to a fair trial but not a perfect one." *Lutwak* v. *United States*, 344 U. S. 604, 619; see *Hopt* v. *Utah*, 120 U. S. 430, 438; cf. Fed. Rule Crim Proc. 52 (a). It is not unreasonable to conclude that in many such cases the jury can and will follow the trial judge's instructions

to disregard such information. Nevertheless, as was recognized in *Jackson* v. *Denno, supra,* there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Compare *Hopt. v. Utah, supra; Throckmorton* v. *Holt,* 180 U. S. 552, 567; *Mora* v. *United States,* 190 F. 2d 749; *Holt* v. *United States,* 94 F. 2d 90. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others.[11] The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed. *Pointer* v. *Texas, supra.*[12]

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[11] See *Crawford* v. *United States,* 212 U. S. 183, 204; *Caminetti* v. *United States,* 242 U. S. 470, 495; *Stoneking* v. *United States,* 232 F. 2d 385.

[12] It is suggested that because the evidence is so unreliable the need for cross-examination is obviated. This would certainly seem contrary to the acceptance of the rule of evidence which would require exclusion of the confession as to Bruton as "inadmissible hearsay, a presumptively unreliable out-of-court statement of a nonparty who was not a witness subject to cross-examination." *Post,* at p. 1. "The theory of the Hearsay rule is that the many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested assertion of a witness, may be best brought to light and exposed by the test of Cross-examination." 5 Wigmore, Evidence § 1362, at 3. The reason for excluding this evidence as an *evidentiary* matter also

We, of course, acknowledge the impossibility of determining whether in fact the jury did or did not ignore Evans' statement inculpating petitioner in determining petitioner's guilt. But that was also true in the analogous situation in *Jackson* v. *Denno*, and was not regarded as militating against striking down the New York procedure there involved. It was enough that that procedure posed "substantial threats to a defendant's constitutional rights to have an involuntary confession entirely disregarded and to have the coercion issue fairly and reliably determined. These hazards we cannot ignore." 378 U. S., at 389. Here the introduction of Evans' confession posed a substantial threat to petitioner's right to confront the witnesses against him, and this is a hazard we cannot ignore. Despite the concededly clear instructions to the jury to disregard Evans' inadmissible hearsay evidence inculpating petitioner, in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination. The effect is the same as if there had been no instruction at all. See *Anderson* v. *United States*, 318 U. S. 350, 356–357; cf. *Burgette* v. *Texas*, 389 U. S. 109, 115.

Reversed.

MR. JUSTICE BLACK concurs in the result for the reasons stated in the dissent in *Delli Paoli* v. *United States*, 352 U. S. 232, 246.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

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requires its exclusion as a *constitutional* matter. Surely the suggestion is not that *Pointer* v. *Texas*, for example, be repudiated and that all hearsay evidence be admissible so long as the jury is properly instructed to weigh it in light of "all the dangers of inaccuracy which characterize hearsay generally." *Post*, at p. 4.

SUPREME COURT OF THE UNITED STATES

No. 705.—October Term, 1967.

George William Bruton, Petitioner, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[May 20, 1968.]

Mr. Justice Stewart, concurring.

I join the opinion and judgment of the Court. Although I did not agree with the decision in *Jackson* v. *Denno*, 378 U. S. 368 (see *id.*, at 427), I accept its holding and share the Court's conclusion that it compels the overruling of *Delli Paoli* v. *United States*, 352 U. S. 232.

Quite apart from *Jackson* v. *Denno*, however, I think it clear that the underlying rationale of the Sixth Amendment's Confrontation Clause precludes reliance upon cautionary instructions when the highly damaging out-of-court statement of a co-defendant, who is not subject to cross-examination, is deliberately placed before the jury at a joint trial. A basic premise of the Confrontation Clause, it seems to me, is that certain kinds of hearsay (see, *e. g.*, *Pointer* v. *Texas*, 380 U. S. 400; *Douglas* v. *Alabama*, 380 U. S. 415) are at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, *whatever* instructions the trial judge might give. See the Court's opinion, *ante*, p. —, n. 12. It is for this very reason that an out-of-court accusation is universally conceded to be constitutionally *inadmissible* against the accused, rather than admissible for the little it may be worth. Even if I did not consider *Jackson* v. *Denno* controlling, therefore, I would still agree that *Delli Paoli* must be overruled.

SUPREME COURT OF THE UNITED STATES

No. 705.—October Term, 1967.

George William Bruton, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[May 20, 1968.]

Mr. Justice White, dissenting.

Whether or not Evans' confession was inadmissible against him, nothing in that confession which was relevant and material to Bruton's case was admissible against Bruton. As to him it was inadmissible hearsay, a presumptively unreliable out-of-court statement of a nonparty who was not a witness subject to cross-examination. Admitting Evans' confession against Bruton would require a new trial unless the error was harmless.

The trial judge in this case had no different view. He admitted Evans' confession only against Evans, not against Bruton, and carefully instructed the jury to disregard it in determining Bruton's guilt or innocence.* Contrary to its ruling just a decade ago in *Delli Paoli* v. *United States*, 352 U. S. 232 (1957), the Court now holds this instruction insufficient and reverses Bruton's conviction. It would apparently also reverse every other case where a court admits a codefendant's confession implicating a defendant, regardless of cautionary instructions and regardless of the circumstances. I dissent from this excessively rigid rule. There is nothing in

*As the Court observes, "[i]f . . . the jury disregarded the reference to the defendant, no question would arise under the Confrontation Clause . . . ." *Ante*, at —. Because in my view juries can reasonably be relied upon to disregard the codefendant's references to the defendant, there is no need to explore the special considerations involved in the Confrontation Clause.

this record to suggest that the jury did not follow the trial judge's instructions. There has been no new learning since *Delli Paoli* indicating that juries are less reliable than they were considered in that case to be. There is nothing in the prior decisions of this Court which supports this new constitutional rule.

The Court concedes that there are many instances in which reliance on limiting instructions is justified—"[n]ot every admission of inadmissible hearsay or other evidence can be considered to be reversible error incurable by limiting instructions; instances occur in almost every trial where inadmissible hearsay creeps in, usually inadvertently." *Ante,* at —. The Court asserts, however, that the hazards to the defendant of permitting the jury to hear a codefendant's confession implicating him are so severe that we must assume the jury's inability to heed a limiting instruction. This was the holding of the Court with respect to a confession of the defendant himself in *Jackson* v. *Denno,* 378 U. S. 368 (1964). There are good reasons, however, for distinguishing the codefendant's confession from that of the defendant himself and for trusting in the jury's ability to disregard the former when instructed to do so.

First, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. Though itself an out-of-court statement, it is admitted as reliable evidence because it is an admission of guilt by the defendant and constitutes direct evidence of the facts to which it relates. Even the testimony of an eyewitness may be less reliable than the defendant's own confession. An observer may not correctly perceive, understand, or remember the acts of another, but the admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so

much so that we may justifiably doubt its ability to put them out of mind even if told to do so. This was the conclusion of the Court in *Jackson*, and I continue to believe that case to be sound law.

Second, it must be remembered that a coerced confession is not excluded because it is thought to be unreliable. Regardless of how true it may be, it is excluded because specific provisions of the Constitution demand it, whatever the consequences for the criminal trial. In *Jackson* itself it was stated that "[i]t is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession . . . ." 378 U. S., at 376. See *id.*, at 385–386. In giving prospective effect only to its rules in *Miranda* v. *Arizona*, 384 U. S. 127 (1966), the Court specifically reaffirmed the principle that coerced confessions are inadmissible regardless of their truth or falsity, *Johnson* v. *New Jersey*, 384 U. S. 719, 729, n. 9 (1966). The Court acknowledged that the rules of *Miranda* apply to situations "in which the danger [of unreliable statements] is not necessarily as great as when the accused is subject to overt and obvious coercion." *Id.*, at 730. And, in *Tehan* v. *United States ex rel. Shott*, 382 U. S. 406, 416 (1966), holding the rule of *Griffin* v. *California*, 380 U. S. 609 (1965), not retroactive, the Court quite explicitly stated that "the Fifth Amendment's privilege against self-incrimination is not an adjunct to the ascertainment of truth. That privilege, like the guarantees of the Fourth Amendment, stands as a protection of quite different constitutional values . . . ." The exclusion of probative evidence in order to serve other ends is sound jurisprudence but, as the Court concluded in *Jackson* v. *Denno*, 378 U. S., at 382, juries would have great difficulty in understanding that policy, in putting the confession aside, and in find-

ing the confession involuntary if the consequence was that it could not be used in considering a defendant's guilt or innocence.

The situation in this case is very different. Here we deal with a codefendant's confession which is admitted only against the codefendant and with a firm instruction to the jury to disregard it in determining the defandant's guilt or innocence. That confession cannot compare with the defendant's own confession in evidentiary value. As to the defendant, the confession of the codefendant is wholly inadmissible. It is hearsay, subject to all the dangers of inaccuracy which characterize hearsay generally. Furthermore, the codefendant is no more than an eyewitness, the accuracy of whose testimony about the defendant's conduct is open to more doubt than would be the defendant's own account of his actions. More than this, however, the statements of a codefendant have traditionally been viewed with special suspicion. *Crawford* v. *United States*, 212 U. S. 183, 204 (1909); *Holmgren* v. *United States*, 217 U. S. 509, 523–524 (1910). See also *Caminetti* v. *United States*, 242 U. S. 470, 495 (1917); Mathes, Jury Instruction and Forms for Federal Criminal Cases, 27 F. R. D. 39, 68–69 (1961). Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence. Whereas the defendant's own confession possesses greater reliability and evidentiary value than ordinary hearsay, the codefendant's confession implicating the defendant is intrinsically much less reliable.

The defendant's own confession may not be used against him if coerced, not because it is untrue but to protect other constitutional values. The jury may have great difficulty understanding such a rule and following an instruction to disregard the confession. In contrast,

the codefendant's admissions cannot enter into the determination of the defendant's guilt or innocence because they are unreliable. This the jury can be told and can understand. Just as the Court believes that juries can reasonably be expected to disregard ordinary hearsay or other inadmissible evidence when instructed to do so, I believe juries will disregard the portions of a codefendant's confession implicating the defendant when so instructed. Indeed, if we must pick and choose between hearsay as to which limiting instructions will be deemed effective and hearsay the admission of which cannot be cured by instructions, codefendants' admissions belong in the former category rather than the latter, for they are not only hearsay but hearsay which is doubly suspect. If the Court is right in believing that a jury can be counted on to ignore a wide range of hearsay statements which it is told to ignore, it seems very odd to me to question its ability to put aside the codefendant's hearsay statements about what the defendant did.

It is a common experience of all men to be informed of "facts" relevant to an issue requiring their judgment, and yet to disregard those "facts" because of sufficient grounds for discrediting their veracity or the reliability of their source. Responsible judgment would be impossible but for the ability of men to focus their attention wholly on reliable and credible evidence, and jurymen are no less capable of exercising this capacity than other men. Because I have no doubt that serious-minded and responsible men are able to shut their minds to unreliable information when exercising their judgment, I reject the assumption of the majority that giving instructions to a jury to disregard a codefendant's confession is an empty gesture.

The rule which the Court announces today will severely limit the circumstances in which defendants may be tried

together for a crime which they are both charged with committing. Unquestionably, joint trials are more economical and minimize the burden on witnesses, prosecutors and courts. They also avoid delays in bringing those accused of crime to trial. This much the Court concedes. It is also worth saying that separate trials are apt to have varying consequences for legally indistinguishable defendants. The unfairness of this is confirmed by the common prosecutorial experience of seeing codefendants who are tried separately strenuously jockeying for position with regard to who should be the first to be tried.

In view of the practical difficulties of separate trials and their potential unfairness, I am disappointed that the Court has not spelled out how the federal courts might conduct their business consistent with today's opinion. I would suppose that it will be necessary to exclude all extrajudicial confessions unless all portions of them which implicate defendants other than the declarant are effectively deleted. Effective deletion will probably require not only omission of all direct and indirect inculpations of codefendants but also of any statement that could be employed against those defendants once their identity is otherwise established. Of course, the deletion must not be such that it will distort the statements to the substantial prejudice of either the declarant or the Government. If deletion is not feasible, then the Government will have to choose either not to use the confession at all or to try the defendants separately. As a practical matter, the Government might best seek a ruling as to the admissibility and deleteability of the confession at the earliest possible stage of the trial proceedings, thereby avoiding needless expenditure, time, and effort. The failure of the Government to adopt and follow proper procedures for insuring that the inadmissible portions of confessions are excluded will be relevant

to the question of whether it was harmless error for them to have gotten before the jury. Oral statements, such as that involved in the present case, will present special problems, for there is a risk that the witness in testifying will inadvertently exceed permissible limits. Except for recommending that caution be used with regard to such oral statements, it is difficult to anticipate the issues which will arise in concrete factual situations.

I would hope, but am not sure, that by using these procedures the federal courts would escape reversal under today's ruling. Even so, I persist in believing that the reversal of *Delli Paoli* unnecessarily burdens the already difficult task of conducting criminal trials, and therefore I dissent in this case.

MR. JUSTICE HARLAN joins this opinion without abandoning his original disagreement with *Jackson* v. *Denno*, 378 U. S. 368, expressed in his dissenting opinion in that case (*id.*, at 427).